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CURRENT TOPICS.

THE United States Supreme Court has just rendered a decision of great interest in this state. This case, Cass County v. Johnson, practically overrules the former decision of that court in Harshman v. Bates County, 3 Cent. L. J. 367, as regards the constitutionality of the Township Aid Act of 1868. The later case is decided upon the ground that the decisions of the state court upon the question have been uniform in upholding the act; while in the former case the same court entirely ignored the state decisions. It is true the question was presented in a somewhat different way in the two cases, but that they are totally inconsistent is quite clear. We will publish the full text of the opinion in our next issue.

AN EXTRAORDINARY trial is in progress in Maryland. Two of the judges of that state, Judge Grayson of the supreme court and Yellott of the third judicial district, are being tried on indictments found against them in May last. The charges are malfeasance in office, the alleged malfeasance being the abrupt adjournment of the session of the grand jury while they were engaged in trying to discover what had become of $350,000 of the county's money which had been realized from the sale of an almshouse; and also what the expenses were in removed court cases. In addition to this Judge Yellott is charged with being intoxicated upon the bench. The trials have attracted great attention; the ablest lawyers in the state being engaged in the prosecution and defense. It is to be hoped that the indicted judges will be able to clear themselves from the grave charges brought against them. It is said that when Judge Grayson was about to adjourn the court he was asked what he intented to do with the grand jury. "Damn the grand jury," he replied, "we are going to discharge them."

THE Lord Chief Baron of England has lately been taught that silence in a judge is golden. He is a member of the privy council, which tribunal some time ago delivered an important judgment in an ecclesiastical case. In an unguarded moment, at, it is almost needless to say, the dinner-table, he hinted to his "chaplain" his opinion that in the judgment of the council there was "more of policy than of law." The reverend gentleman was not slow in communicating the words of so high an authority to his brethren who were dissatisfied with the judgment, and the words of the learned judge were soon public property. The chief baron had dissented from the judgment of the council, but there is an order of that body, adopted as early as 1677, which provides that "when the business is carried according to the most voices, no publication is afterwards to be made by any man how the particular voices and opinions went." The learned judge has defended himself in the newspapers, on the ground that this order "was made at a time when the Star Chamber existed, and when members of the privy council were imprisoned under sentences of that tribunal, for words uttered by them in the House of Commons:" and that he is "not aware that it has ever been judicially held, or, indeed, treated as of any effect since the judicial committee was created by statute," but the records show that he is mistaken. In fact, the opinion of the bar and the public is entirely against him, and indorse the order of the privy council, because, it is said, a final tribunal ought to give forth no uncertain sound as to the law, and the publication of conflicting judgments can only tend to weaken the authority of the rule laid down, and so increase litigation and uncertainty.

IN TAKING a case on writ of error to the Supreme Court of the United States, the practitioner should be careful to present the proper bill of exceptions. In Phoenix Ins. Co. v. Lanier, decided at the present term, the plaintiff in error complained that certain evidence was improperly admitted, and that incorrect instructions were given to the jury, but the record did not show that any exception was saved to the admission of evidence or to the charge of the court. No bill of exceptions appeared to have been made up or signed. Mr. Justice Strong, in dismissing the case, said: It is true that in the transcript sent up to us, it is stated that at the trial objections was made to the reception of certain testimony of witnesses that the objection was overruled, and that the defendant then and there excepted to such ruling of the court and assigned error thereon. So the transcript states that the judge gave substantially certain instruction to the jury, and adds, 'to which portion of said charge said defendant then and there excepted and assigned the same as error.' But even if the facts occurred as certified by the clerk, his statement that they occurred does not bring them upon the record so as to make them the subject of review. There is but one mode of bringing upon the record and making a part of it the rulings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions allowed and sealed or signed by the judge. It is true that in the hurry of the trial the bill is not often reduced to form and sealed or signed. Generally an exception is only noted by the judge at the time claimed and it is subsequently drawn up, but it is not a bill of exceptions until it has been sealed, or, as is now sufficient, signed. The sealing or signature of the judge is essential for its authentication." And it has been ruled that the judge's notes do not constitute a bill of exceptions. They are but memoranda from which a formal bill may afterwards be drawn up and sealed. Pomeroy v. The Bank of Indiana, 1 Wall.

592. There it is said: "When exceptions are taken to the ruling of the court in the course of a trial to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him, and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he seasonably availed himself of the right to reduce the same to writing, and took proper measures to have the bill of exceptions sealed by the judge presiding at the trial, or in other words, such an entry in the minutes can only be regarded as evidence of the right of the party seasonably to demand a bill of exceptions, but it is not the same thing, and it has never been so considered in the federal courts." And again: "Unless an exception is reduced to writing and sealed by the judge it is not a bill of exceptions within the meaning of the statute authorizing it, and it does not become part of the record."

THE OPINION of the Supreme Judicial Court of Massachusetts has just been filed in the somewhat celebrated Northampton National Bank robbery case, Com. v. Scott. The prisoners, Dunlap and Scott, were indicted for robbery of the Northamption National Bank, at Northampton, Mass. The case was tried before a jury at the June Criminal Term, 1877, of the Superior Court for Hampshire county, Bacon, J., presiding. The defendants were convicted, and the case was brought up on exceptions taken to the rulings of the court below, and argued at the September Law Term of the Supreme Judicial Court. The opinion of the latter court, overruling the exceptions, was delivered by Morton, J. The case being too long to be reported in full, we give an abstract of the opinion: 1. It is well settled in this commonwealth that, while as a general rule, the district attorney or other prosecuting officer should conduct the trial of criminal cases, yet it is within the power of the court in particular cases, in which from peculiar circumstances the interests of public justice seems to require it, to appoint a counselor of the court to assist the public officer in the trial. Com. v. Williams, 2 Cush. 582; Com. v. Knapp, 10 Pick. 477; Com. v. Gibbs, 4 Gray, 146; Com. v. King, 3 Gray, 501. And the questions whether the circumstances require such appointment, and whether the person recommended by the public officer is a fit and proper person, are, in a large degree, within the sound discretion of the court below, by which they must, in the first instance, be decided. 2. It is not competent for the defendant to prove what is his usual and natural voice by using his voice in the court room "to repeat something," when not under oath as a witness. King v. Donahoe, 110 Mass. 155. 3. The government claimed and was allowed to prove by one Edson "that in the year 1873 said Edson, the two defendants and one William Connor formed a general conspiracy to rob banks; that it was a part of their plan, and understanding that, in their travels through the country, they should obtain information of such banks as were insecure and feasible for robbery, and should report to each other the result of their observations; that in the summer of 1875, Edson, who was in the employ of Herring & Co., of New York, safe makers, and had been sent by them to Northampton on business of the company, first informed himself of the practicability of robbing the Northampton National Bank, and reported the same to the defendants at Wilkesbarre, Penn., and then furnished the defendants with the means of duplicating the vault lock; that this was done in pursuance of their general conspiracy before mentioned." It was clearly competent for the government to show the whole history of the robbery charged, from the inception of the scheme to its final consummation. The evidence was competent as tending to prove the crime charged, and it is not rendered incompetent because it also tends to prove the commission of other crimes. Com. v. Choate, 105 Mass. 451. 4. For the same reason, the testimony of Edson as to the acts of the defendants and their conspirators, in making preparations for carrying out the robbery was competent. 5. There being evidence sufficient to be laid before the jury to prove the conspiracy, as to which the presiding justice was in the first instance to determine, it was competent for the government to put in evidence any acts of the several conspirators in furtherance of the common purpose of the conspiracy, either before or after the robbery was committed. Com. v. Brown, 14 Gray, 419. Accordingly, Edson having testified without objection that a few days after the robbery he met the other conspirators on business connected with the robbery, it was competent for the government to show by him that the conspirators had previously arranged for calling such meetings by means of "personals" in the New York *Herald*, and that this meeting was called by a "personal" inserted by him, in reply to which another was inserted by Conner. The insertion of these "personals" were acts of two of the conspirators in carrying out the purpose of the conspiracy, and were thus competent against the defendants. The newspaper was the best evidence of their insertion, and was important to fix the date of the meeting. 6. For the same reasons a "personal," warning the defendant, Scott, of the danger of his visit to Northampton for the purpose of bringing to New York the securities stolen from the bank, was competent, and it is immaterial whether Scott saw it or not. 7. So, the fact that Williams, a director of the bank, met Conner, one of the conspirators, and had negotiations with him relative to the return of the stolen property, was competent, and the fact that Edson took him to see Conner was admissible as a part of the transaction, and as tending to corroborate Edson's testimony that he and Conner were members of the conspiracy. 8. The testimony of a witness called by the government, that about two days before the robbery

he sold to two men in Springfield a pair of drawers and some socks, like those left by the robbers in the cashier's house (which was entered for the purpose of securing the keys of the bank) was competent, there being evidence tending to show that these two men were the defendants. 9. Edson testified, without objection, that in August preceding the robbery, he met the defendant, Dunlap, at Wilkesbarre, for the purpose of conferring together in regard to the robbery. The government introduced against the defendant's objection, the register of the "Wyoming Valley House," of Wilkesbarre, and Edson testified to his own signature therein, under date of August 5, 1875, and that of Dunlap, under the assumed name of R. C. Hill. If there is doubt of the admissibility of this evidence upon other grounds, it was competent for the purpose of fixing the time when the interview took place. 10. The defendants asked the court to instruct the jury "that the corroboration required of the witness, Edson, is not the corroboration of that part of the witness' story which relates to his own acts and declarations, but corroboration of that part of the story which connects the defendants with the robbery." This the court refused to give, but instructed the jury "that Edson being a confessed accomplice, it was not safe for a jury to convict the defendants on his uncorroborated testimony, although if they believed his testimony, they could do so; the testimony of an accomplice should be scrutinized with extreme caution by the jury, and it is not safe or prudent for the jury to convict in this case upon the evidence of Edson alone, unless he is corroborated in important and material respects in matters vital to the issue in this case." The court was not required as matter of law to give the instruction requested, and the instructions given are not open to exception. It is well settled that a jury may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt of the defendants. But it is the usual practice to advise the jury to acquit, if there is no other evidence; though if this rule of practice, because of its uniformity, has acquired the force of a rule of law, still there is not the same uniformity in the practice as to the kind of corroboration required. The weight of the corroborating evidence is for the jury, and when there is such evidence upon matters, material to the issue, there is no rule of law obliging the judge to instruct the jury to acquit, unless there is also corroboration of the statements connecting the defendants with the crime. See Com. v. Bosworth, 22 Pick. 397; Com. v. Brooks, 9 Gray, 299; Com. v. Price, 10 Gray, 472; Com. v. O'Brien, 12 Allen, 183; Com. v. Larrabee, 99 Mass. 413; Com. v. Elliot, 110 Mass. 104; Com. v. Snow, 111 Mass. 411; Reg. v. Stubbs, Dearsly, 555, S. C. 7 Cox, C. C. 48; State v. Wolcott, 21 Conn. 272.

THE Supreme Court of Pennsylvania, in the case of the attachments against Governor Hartranft and other state officers to appear before a grand jury and testify in regard to the late riots, has reversed the decison of the superior court!

THE ADMISSIBILITY IN EVIDENCE OF BOOKS OF ART OR SCIENCE WHICH ARE OF ESTABLISHED REPUTATION AND AUTHORITY, IN CASES WHERE QUESTIONS OF SCIENCE OR ART ARE INVOLVED.

The general rule of evidence requires, of course, that *facts* only, and not *opinions* or *inferences* of the witness, shall go to the jury; so that they may draw their own conclusions from the facts given them in evidence, as tending to prove or disprove the issue. An exception, well established, prevails in all the courts, in cases involving questions of art or science. The reason is obvious. Judges and jurors are not usually skilled in science, and are, therefore, unable in cases where scientific deductions must be drawn from the facts, to arrive at satisfactory conclusions. Hence the introduction of the testimony of *experts*. This is usually done by the examinations as witnesses of persons professing to be skilled in the particular branch of art, science or specialty involved in the issue. The witness need only testify himself, upon preliminary inquiry, that he possesses some knowledge of the specialty involved, and he is competent; and the extent of his qualifications goes to his credibility only.

It is not proposed to discuss the general subject of expert testimony, which is, perhaps, too well understood by the profession to warrant such discussion. It may be said, however, that the general rule in many of the courts, both in England and in this country, is that, while an expert may give his opinions upon questions of science, derived either from experience or books, or both, yet the books themselves can not go in evidence, nor can the witness be allowed to read from them while on the stand, though his attention may be called to them on cross-examination, for the purpose of showing that he is mistaken in founding his opinion upon that of an author referred to.

But while this is a fair statement of the rule, as it has been laid down in some of the cases where the question has arisen, yet such books have in many other courts been admitted in evidence. And it is proposed in this paper to show: 1. That the rule of exclusion is not based upon principle nor reason. 2. That it is not established by sufficient authority to be regarded as a settled rule in the law of evidence, as has been sometimes claimed.

The objection to the admissibility in evidence of standard books, written by eminent authors upon special scientific subjects, is based upon the theory that such evidence is wanting in the two primary tests of truth, viz: the obligation of an oath, and the opportunity of cross-examination by the adverse party.

To the first of these rules as tests of truth, there are numerous exceptions, and one of them—the one which renders competent exemplifications of office books and papers, authenticated by the certificate of the officer who is their custodian—is a notable exception to the rule. And while this exception is ordinarily justified upon the ground that the records are kept, and the certificate is made by

a *sworn* officer, yet, the admissibility of such evidence may well be placed on much higher grounds, namely, the public confidence in the officer, and the many guards against a successful falsification; in short, the absence of all danger of false testimony, notwithstanding the want of an *oath*. Indeed, the rule would probably not be changed if official oaths were abolished.

Before scientific books can be admitted in evidence they must be proved, by oral testimony, to be esteemed by those skilled in the specialty generally, as standard works; and in order to this, they must have stood the test of scientific criticism, and must be taken as the embodiment of the opinions of those engaged in the specialty invovedl in the enquiry. If this be true, such a written treatise is the very *highest* and *best* evidence of the opinions of the profession, in the particular branch of science or art, and opinions are what are sought in this class of evidence. Such books are the main sources of all expert testimony, and in large classes of cases almost the exclusive sources. If, therefore, the books are excluded for the technical reasons alluded to, notwithstanding the tests of truth are a thousand fold stronger than the technical tests mentioned, and notwithstanding there are neither opportunities nor temptations to falsification; and if the testimony of those who derive their knowledge from the books is substituted, then surely for fear of violating one canon of the law of evidence, another one is violated. It is a well established rule that the *best* evidence is preferred to that which is *inferior*. That *secondary* evidence is inadmissible while the *primary* can be procured. Here the books are the *highest* evidence, the proof of their contents, which all admit may be given as evidence, is *inferior*. The books are the *primary* evidence and their contents, proved by parol, but *secondary*. In such a case the enquiry is after scientific truth, and whatever method of obtaining the same is, according to the experience of all persons engaged in legal investigations, the most likely to elicit the truth is the mode which should be adopted. And if there is any merely technical objection to the adoption of such a mode it might well be dispensed with and abandoned, and especially where the substituted mode is simply in furtherance of the general rule and is fraught with no danger.

Let us enquire for a moment as to the most successful mode of conducting this search after scientific truth tested by experience. Suppose the question to be like it was in a case to which reference will presently be made; whether a physician had given an overdose of medicine. How can this be best determined? Should reference be had to the standard treatises upon the subject, such as, Headley, Dunglison or Wood, or would the ends of justice be better served by taking the testimony of some partially educated practitioner, as is too often inevitable with these experts. Or suppose the question is one touching the effect of poison. Should it be submitted alone to tests made by living witnesses more or less competent according to the character of their education, or would not the court and jury be enlightened and aided by reference to the works of Beck, Taylor, Stille, Wormsley, or other standard works upon chemistry and toxicology? In a case involving mental unsoundness should the court and jury be content with the testimony of the best physician available, whether well educated or poorly educated, whether he has ever treated an insane patient or whether he has treated many, for if he swears he has any knowledge at all upon the subject he is competent, or are not both court and jury better prepared to perform their duty after having read to them the proper selections from the works of men like Dr. Taylor, Dr. Beck, Dr. Maudsley, Dr. Ray and Dr. Stille? Or suppose the question be as to the cause of a steam boiler explosion, shall the evidence be confined to the examination of experts on the stand, too frequently uneducated engineers, or would not the triers be more likely to reach correct conclusions by the reading from such books as Tyndall's "Heat as a Mode of Motion," Bourne's "Handbook of the Steam Engine," Robinson's and Colburn's works on steam boiler explosions, or other works of like character on the subject; works of men who have spent years of time and thousands of money in perfecting their knowledge upon these subjects, and whose works are scarcely sufficiently understood by those who testify as experts to enable them to be passably intelligent, not to say to supply the place of the books themselves.

It is clearly manifest from what has already been said that no apparent advantage, which might seem to result from a blind adherence to the technical rules of evidence referred to, can atone for the disadvantages of excluding scientific books as evidence in proper cases. And further, that the very nature and character of this class of evidence so exempts it from the danger of falsification as to render it an exception to the rule requiring the tests of the obligations of an oath, or the opportunity of cross-examination, and brings it within the maxim "*Cessante Ratione Legis Cessat ipsa Lex.*"

But it is said that books of science are not within the comprehension of courts and juries, and especially the latter. There is, however, little force in this objection, for juries are as little familiar with other classes of evidence, indeed the testimony of the scientific book is usually about as intelligible to the jury as the evidence of the expert, and judges usually find little difficulty in comprehending scientific principles from books and explaining them to the jury. Besides counsel must become familiar with the principles involved in the particular controversy, and with the aid of expert testimony, which is not dispensed with by the introduction of books, terms of science or art may be easily explained both to court and jury, when it is necessary that such explanation shall be made.

True, it is said, that by the examination of the experts, the results obtained being derived alike from the learning found in the books on the particular subject, and the experience of the writers are

more saisfactory than the reading of the books in evidence. In theory, this looks plausible, but in practice the proposition is without foundation. It is the substitution of the experience of an inferior grade of men, for that of the very highest grade, of limited experience, perhaps confined to a few opportunities of obtaining knowledge for the most extended experience, often embracing a long life of the ablest men known in civilization devoted to a specialty. No better illustration can be had to prove the superiority of books as evidence, over that of experts than the reproach of science always exhibited in the legal investigations of controverted questions of science or art in the courts, where it is found that men equally entitled to credit as regards standing and veracity, educated in the same specialty and reading the same books, testify *in direct contradiction of each other*. So that in most cases, and perhaps nearly all involving questions of art or science, experts may be found to prove any given theory, and directly contrary theories, and that notwithstanding the books upon the special subjects involved, speak a uniform language.

2. Is the inadmissiblity of scientific books settled by authority. The proposition may rather be said to have been assumed than setted, either by text books or decided cases.

In a note to one of the sections of an early edition of Greenleaf on Evidence, the doctrine of exclusion is laid down and an English report cited as authority. Greenleaf on Evidence, § 440, citing Collier v. Simpson, 5 Car & P. 73. The case cited was a trial in the court of common pleas, at *nisi prius*, before Tindal, C. J., and as it seems a leading authority upon the point, inserting the report in full may be pardoned, as it will occupy less space than a proper statement of it would. It is as follows:

"*Slander.*—The declaration stated, that the plaintiff was a physician, and that the defendant spoke certain words, imputing that the plaintiff had prescribed improper medicine for a child. Pleas—general issue, and several pleas of justification, stating that the plaintiff prescribed corrosive sublimate, in too large doses. Replication *de injuria*.

"It appeared that the complaint under which the child labored was water on the brain.

"WILDE, Sergt., proposed to show, that the prescriptions were proper, and the doses not too large; and wished to put in medical books of authority to show what was the received opinion in the medical profession.

"TINDAL, C. J.: I think I can not receive medical books.

"WIGHTMAN: When foreign laws are to be proved, it frequently happens that a witness produces a foreign law, and states it to be a book of authority.

"TINDAL, C. J.: Physic depends more on practice than law. I think you may ask a witness whether in the course of his reading he has found this laid down.

"Sir H. Halford, president of the college of physicians, was called. He stated that he considered the medicine proper, and that it was sanctioned by books of authority. He stated that the writings of Dr. Merriman and Sir Astley Cooper were considered of authority in the medical profession.

"BOMPAS, SERGT.: I submit that medical books can not be cited—more especially those of living authors. Sir Astley Cooper and Dr. Merriman might be called.

"WILDE, SERGT.: I wish to show that these books are acted upon by persons in the medical profession.

"TINDAL, C. J.: I do not think the books themselves can be read; but I do not see any objection to your asking Sir Henry Halford his judgment and the ground of it, which may be in some degree founded on books as a part of his general knowledge."

A reprint of the same note to the same section of Greenleaf on Evidence, in Redfield's edition, adds Commonwealth v. Wilson, 1 Gray, 338. The report of this last case like the one just given is short and is here inserted. It was a trial before Shaw, C. J., upon an indictment for murder. Insanity was relied on by the defense.

"P. H. SEARS, in opening the case for the defendant, proposed to read to the jury, definitions of insanity from works of established reputation on the subject, and contended that books written by lawyers were admissible even if the court should hold that the treatises of medical writers were not. And he referred for instances in which such works had been permitted to be read to the jury to Roger's Trials, 48, 76, 79, 80. Reginars McNaughton, 1 Townsend's State Trials, 357, 358; Reginar's Oxford, 9 Car. & P. 531, 532. He also proposed in order to call the attention of the jury to the recent increase of insanity in this country, to read the statistics referred to by counsel for the defendant in Roger's Trial 48, and by Parker, C. J., of New Hampshire, in a charge to the grand jury, 20 Am. Jurist, 456.

"SHAW, C. J.: Facts or opinions on the subject of insanity, as on any other subject, can not be laid before the jury except by the testimony under oath of persons skilled in such matters, whether stated in the language of the court, or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact, and must be proved on oath. The opinion of a lawyer on such a question of fact is entitled to no more weight than that of any other person not an expert. The principals governing the admissibility of such evidence have been fully considered by this court since the trial of Rogers; and the more recent English authorities are against the admission of such evidence. See Collier v. Simpson, 5 Car & P. 74; Cocks v. Purday, 2 Car & Kirk. 270, 1 Greenl. Ev. § 440, note." * * * * * * * * *

Cocks v. Purday was a *nisi prius* trial before Earle, J., of the common pleas. The case involved a foreign law, and it was proposed to prove it by a foreign lawyer of the same country by parol. Objection was made, that if a written law was to be proved, it should be put in evidence and read. The objection was overruled and the proof admitted, without argument or authority on the part of the court. But even this is in violation of an elementary rule which requires the production in evidence of a foreign written law as well as any other written evidence. 1 Greenl. Ev., § 487 *et seq.* The Commonwealth v. Wilson is probably based upon Ashworth v. Kittridge, 12 Cush. 193, although that case is not cited, where the objection is sustained upon the grounds of the absence of the obligation of an oath, and the want of opportunity for cross-examination, but citing no authority and containing no argument. In Washburn v. Cuddily, 8 Gray, 430, the doctrine is announced as well settled, citing the other two cases. In Carter v. The State, 2 Ind. 617, the court, in a case where the question was not involved, upon the authority of Collier v. Simpson, sustain the *non-admissibility* of scientific books as evidence. Judge Redfield says, speaking of this class of testimony: "This has been allowed by many courts, either as part of the testimony or of the argument of counsel. But when objected to, they have not generally been read, either before court or jury." 1 Redfield on Wills, 146, and notes 26-7-8; citing the cases already discussed.

The question, then, is only treated as settled by tacit acquiescence of the courts in a few cases based upon the mere statement of the proposition by the Chief Justice of the English Common Pleas, in a case at *nisi prius*. And neither in the original case, nor any of those which follow it, can it be said that there was any examination of the foundations of the rule. Indeed, but one of all the cases even states the elementary grounds upon which it is sought to support it. But in this even there seems no uniformity, for Judge Redfield notices an objection to these grounds, stated in Ashworth v. Kittridge, and virtually abandons them, and places the objection upon the want of qualification of the triers to understand this class of evidence. Thus rather begging the question than meeting it. And the answer to the grounds upon which the objection is sought to be based is not met in any decided case or elementary work.

An examination of the question, then, shows that the doctrine is not sustained by any well-considered case or text-book which gives any intelligent reason for the objection.

The chapter upon medical evidence in Beck's Medical Jurisprudence, which was written or revised by an able lawyer and judge (2 Beck's Med. Juris., 895, note), contains some suggestions upon the point which show the view of the medical profession generally, and that the doctrine of exclusion can not be regarded as settled in this country. Indeed, the author states that the doctrine is exclusively English, and that no case of exclusion has occurred in this country, or rather, perhaps, that this objection had never been made in this country. This was perhaps true at the date of the earlier editions of this work, but there have been a few exceptions since, as is manifest from what has been said.

This chapter also contains an extract from a medical journal, which is inserted here as a forcible, if not conclusive, answer to the objection, founded upon the absence of the obligations of an oath. 2 Beck's Med. Juris. 919. "The practice of the English judges, in excluding a reference to authors, evidently arises from the principle in law that nothing is evidence which is not delivered upon oath. But is an oath more binding than the solemn act of sincerity between the author and the world, by the very act of publication? Would Paris and Fonblunque be better authority if they swore to it before the twelve judges. And is it not manifest, that, if the exclusion be made to act systematically, it must inevitably end in excluding medical and scientific evidence altogether; for scientific inquiries at law can scarcely be anything else than a tissue of references to written authorities. Of what use would be all the personal experience of any physician, unless he knew, by referring to that of his predecessors, the conclusions he is entitled to draw from it?" 2 Beck's Med. Juris. 919. This argument is certainly conclusive as to the fact that the contents of books of science must go in evidence, and is persuasive upon the unsoundness of the objection to the introduction of the *books themselves*.

Again: In the note of Greenleaf referred to, as well as the note referred to in Redfield on Wills, reference is made to Bowman v. Wood, 1 Ia. 441, as sustaining the admissibility of books of science. In this case the court below sustained an objection to the reading of medical books as evidence in an action for malpractice. The supreme court reversed the case, and in the course of the opinion discussed the authorities *pro* and *con*, and, summing up, conclude: "The opinions of the author, as contained in his works, we regard as better evidence than the mere statement of them by a witness who testifies to his recollection of them from former reading. Is not the latter secondary to the former? On the whole we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice involved in a trial. This rule appears to us the most accordant with well established principles of evidence."

On all-fours with this last case, is the case of Stoudenmeier v. Williamson, 29 Ala. 558, where it is said: "Medical works by authors which are admitted or proved to be standard with the profession, are admissible as evidence, with proper explanations of technicalities or terms not generally understood."

Again, in the "*Pawashick*," 2 Lowell, 142, before Judge Lowell, the question was as to the effect of the law of England, under what is known as the *Merchants Shipping Act*, upon a case in admiralty in this country, and alleged to be governed by the law of England; the court held that the law of England must be pleaded and proved as a fact. But that the law may be proved by the production of printed statutes, reports or text books, as well as by experts. In the course of the opinion, the learned judge says: "The law is a progressive science; and if printed books have superseded manuscripts, and are cited instead of certified copies, we may as well acknowledge the fact and act accordingly." Discussing the subject of statutes. he says: "In Eams v. Smith, 14 How 400, it was laid down as the *rationi decidendi* that foreign written law may be received when found in a statute book, with proof that the book has been published by the government which made the law; but this does not exhaust the possible modes." Again: "I do not see how it would be possible, under the American practice, to reject certified copies of the decisions of the English courts; and if not, we come back to the original question, whether an idle, unnecessary, and obsolete method of investigation shall be insisted on." The opinion in this case is a clear exposition and vigorous examination of the question, and review of the authorities; and while the ruling is expressly confined to the case in judgment, yet the reasoning is equally applicable to the whole subject. The theory of the ruling is that the rules of verification, like the tests of truth, vary with the changed condition of things, growing out of the progress of civilization, and neither should be insisted upon in cases where thay are totally unnec-

essary. Indeed, there is no reason which applies to the mode of proving the law which does not apply to the proof of every other science or art. If a text book, written by a lawyer skilled in the law, may be used as evidence of what the law is in a given country, so may the treatises upon medicine, mechanics, or any other science or art, be read for the purpose of showing what the teachings of the art, science or specialty, are in the particular case. In Wilson v. The Commonwealth, *supra* law and medicine are classed together. It is true that Chief Justice Tindall says that physic is governed more by practice than law; but this is but begging the question, conceding that the matter in controversy is one more of practice than theory, still the question recurs: How are the results of this practice or experience to be best obtained, whether by the verbal statements under the sanctions of an oath of the best living experts available, or by reference to the recorded experience of the ages, tested also by the corroborative testimony of the experts themselves, under like sanction? And it would seem that there could be but one answer.

It is impossible to note the discussions of this question, by judges and lawyers, without observing some striking peculiarities. On the one hand they show a reluctance to discard or even establish exceptions to what seems a settled rule of law. And this reluctance is even carried so far as to enforce the rule where it is apparent to every one not wedded to the obligations of technical learning, that it is not applicable, or at best has but a doubtful application, while on the other hand, in the few cases where the technical rule has been enforced, and this class of evidence has been excluded, it has been done without the sanction of any reason, and without meeting, or attempting to meet or answer the position that such evidence is not within the reason of the rule.

And, at the same time it everywhere appears that counsel engaged in the trial of causes, seeing the almost absolute necessity, or, at all events, the great advantages of such a course, have constantly, and even with the consent of the court, read books of science to the court or jury, or both, as is admitted by those who insist, as a matter of law, upon the rule of exclusion. 1 Redfield on Wills, 146, sec. 15, sub sec. 1. And sometimes the indulgence of permitting an expert witness to read from an author on the specialty involved, at his own request has been awarded, and in one instance upon his unanswerable response to the objection of the court. Said Dr. Crell, in the trial of Spencer Cowper, in answer to an objection by the court: "My Lord, it must be by reading, as well as a man's own experience that will make any one a physician, for without the reading of books in the art, the art itself cannot be attained to. I humbly conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men; neither do I see any reason why I should not quote the fathers of my profession in this case, as well as you gentlemen of the long robe, quote Coke upon Littleton in others," and upon this answer the doctor was permitted to proceed with the quotation. Beck's Med. Juris. 918-19, and notes.

These suggestions lead to the conclusion that there is a strongly marked conviction in the minds of the legal profession, and which has more or less sanction in the courts, that books of science and art are not embraced in the technical rules of exclusion, and that such books should go to the court and jury as evidence, or to the court as authority in argument. The preceding quotations contain most that appears upon the subject in reports or text-books, and certainly the rule of exclusion is *not* settled by them. On the contrary, it is *unsettled*.

It is therefore submitted that the proper settlement of the now conflicting rules of practice upon the subject under discussion, would render scientific inquiry through the medium of judicial proceedings more certain and satisfactory. And that the rule might be laid down thus: 1. In all cases involving questions of art or science, the proper preliminary proof being first given, let books written by authors of high standing and reputation in their profession or specialty, be read to the court and jury, under the control of the court as to the *extent* of the testimony of this character which is to be given in the particular case, and as to the necessary notification of the adverse party of the intention to read the same; and let the court have full power to control the explanation of any difficult or technical terms by parol, so as the same shall be fully understood by court and jury.

2. In all cases tried without a jury let books of art or science be read either in evidence or in argument, or for illustration, with such limitations as the court shall fix.

This mode of solving the question would simplify and systematize that which is now in confusion, and would tend to settle that which is and always has been unsettled in practice.

The first of these propositions has been fully discussed, and in support of the second, in addition to the suggestion quoted from Redfield on Wills, it is submitted that it would be a very singular paradox to permit counsel on argument involving the question of insanity, in a will case, to read from the chapter in Redfield on Wills upon this subject, which they would have a clear right to do under the ordinary rules of practice, and at the same time to refuse them the right to read from the works of Taylor, Ray, Beck or Stille, upon which Judge Redfield's treatise is founded. or, to illustrate the same subject more fully, by a reference to the works of Drs. Bucknell, Maudsley and other still more modern authors upon the same subject.

Although the rules of law in general are founded upon principles, and as principles are immutable, the changes in these rules are not, therefore, frequent, yet it is very important, before insisting upon a rule, to be sure that it is based squarely upon the underlying principle and is supported by reason. And as new applications of these rules

are constantly arising, and principles even are developing in legal science, as elsewhere, new phases, experience teaches that the administration of justice is best promoted by a liberal construction of technical rules, and by the introduction of exceptions for the furtherance of justice in cases where good will result, and where no evil can arise.

All innovations, or even the introduction of exceptions, in the promotion of the spirit of general rules should be avoided where by possibility they may tend to confusion, uncertainty or inconvenience; but where as in the present case, confusion will be prevented and certainty and convenience promoted, there should be no hesitancy.

ASA IGLEHART.

INTER-STATE COMMERCE.

STATE v. SAUNDERS.

Supreme Court of Kansas, July Term, 1877.

[Filed September 26th, 1877.]

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

SECTION six, of the act of the legislature of Kansas of 1876, entitled "An act for the protection of birds," laws of 1876, pages 183, 184, so far as it prohibits the transportation from Kansas to other states of prairie chickens, which have been lawfully caught and killed, and have thereby lawfully become the subjects of traffic and commerce, is unconstitutional and void, being in contravention of that provision of section eight, article one, of the federal constitution, which declares that "the Congress shall have power. * * * 3. To regulate commerce * * * among the several states.

Appeal from Cherokee county.

Harris & Spencer for the appellant; *Hon. Willeard Davis, Attorney-General*, and *D. M. McKenney*, for the State.

VALENTINE, J., delivered the opinion of the court:

This was a criminal prosecution for an alleged violation of section 6 of the act of the legislature of the state of Kansas of 1876, entitled "An act for the protection of birds." Laws of 1876, p. 184, 183. It seems that the defendant, as agent of the Adams Express Company, did, on the 8th day of November, 1876, ship by said express company from Columbus, Cherokee county, Kansas, to Chicago, Illinois, four prairie chickens, which prairie chickens had previously been killed as game. Said prairie chickens were not caught or killed in violation of any law, but were caught and killed at a time and in a manner which was proper and legal. The provision of said act, which it is claimed that the defendant violated, reads as follows: "It shall be unlawful for any person, railroad corporation, or express company, or any common carrier, knowingly to transport or to ship, or to receive for the purpose of transporting or shipping any of the animals, wild fowls or birds mentioned in this act, *in or out of the state of Kansas*, * * * and any agent of any such person, corporation or company who shall knowingly violate the provisions of this section by receiving or shipping any such game, as the agent of such person, corporation or company, shall, on conviction thereof, be fined in a sum not less than ten nor more than fifty dollars; *provided*, that such penalty shall not apply to the transportation of such birds and animals in transit through this state from other states and territories." The defendant claims that said act is unconstitutional and void, so far as it has any application to this case.

First, because it is in violation of that clause of section 16, article 2, of the constitution of Kansas, which declares that "no bill shall contain more than one subject, which shall be clearly expressed in its title;" *Second*, because it is in violation of that provision of section 8, article 1, of the Constitution of the United States, which declares that "the Congress shall have power * * * * to regulate commerce * * * * among the several states."

First.—Of course said act of the legislature is unconstitutional and void so far as it relates to any animal except "birds;" and how the inhibition against the transportation of living birds would promote "the protection of birds" is not altogether clear. The birds transported in this case were however dead, and it is supposed by the plaintiff that the prevention of the shipping or transportation of dead birds would in some manner "protect birds," and therefore that the act so far as it prohibits the shipping of dead birds (although the birds are lawfully taken and killed) is constitutional and valid. We shall not decide this question, however, but shall pass to the next question.

Second.—Section 8 of article 1 of the constitution provides, among other things, that "congress shall have power; * * * 3. To regulate commerce with foreign nations, among the several states, and with the Indian tribes." Ever since the adoption of this provision the judges of the Supreme Court of the United States seem to have been groping their way cautiously, but darkly, in endeavoring to ascertain its exact meaning and the full scope of its operation. They have many times construed it, but as yet they have hardly fixed its boundaries or its limitations. They have, no doubt, generally construed it correctly, but some of their decisions with reference thereto seem to be conflicting and contradictory, and scarcely one of such decisions has been made without a dissenting opinion from one or more of the judges. We think, however, that amidst all their conflicts and wanderings they have finally settled, among other things, that no state can pass a law (whether congress has already acted upon the subject matter thereof or not) which shall directly interfere with the free transportation, from one state to another, or through a state, of anything which is or may be a subject of inter-state commerce. Case of the State Freight Tax, 15 Wallace, 232, and cases there cited. See also in this connection Welton vs. the State of Missouri, 91 U. S., 275; Henderson vs. Mayor of N. Y., 92 U. S., 259; Chy Lung vs. Freeman, 92 U. S., 275; Ward vs. Maryland, 12 Wallace, 418. This view of the law does not prevent a state from passing proper sanitary laws, or any proper law, for the protection or preservation of life, liberty, health or property. Nor does it in any case prevent a state (in the absence of congressional legislation upon the subject) from passing laws for any proper purpose where such laws only indirectly and remotely interfere with inter-state commerce. State Tax on Railway Gross Receipts, 15 Wallace, 284; Sherlock vs. Alling, 93 U. S., 99. See also in connection with this and the foregoing propositions the following Texas cattle cases, to-wit: Chicago and Alton R. R. Co. vs. Gasaway, 71 Ill., 570; Sangamon Distilling Co. vs. Young, 77 Ill., 197; Wilson vs. Kas. City, St. Jo. & C. B. R. R. Co., 60 Mo., 184; 60 Mo. 216; K. P. R'y Co. vs. McCoy, 8 Kas., 538. For instance, a law which prohibits the catching and killing of prairie chickens may be valid, although it may indirectly prevent the transportation of such chickens from the state to any other state; but a law which allows prairie chickens to be caught and killed, and thereby to become the subjects of traffic and commerce, and at the same time *directly* prohibits their transportation from the state to any other state, is unconstitutional and void.

The Federal constitution seems to give to congress the absolute and unqualified power to regulate inter-state commerce; and it has frequently been said that this power is exclusive; and it is certainly exclusive within the limits heretofore mentioned. In the case of Welton vs. the State of Missouri, 91 U. S., 275, 282, it is said that "the fact that congress has not seen fit to prescribe any specific rules to govern inter-state commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-state commerce shall be free and untrammelled." But qualifying this language to some extent, it is said, in the case of Sherlock vs. Alling, 93 U. S., 99, 104, that: "It may be said generally that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit."

We think that said section 6, so far as it has any application to this case, is unconstitutional and void.

The judgment of the court below will therefore be reversed and cause remanded for further proceedings.

All the justices concurring.

CONSTITUTIONAL LAW—"DUE PROCESS OF LAW."

McMILLEN v. ANDERSON.

Supreme Court of the United States, October Term 1877.

1. DUE PROCESS OF LAW—TAX ASSESSMENT.—The constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law, does not require that persons taxed by the law of the state shall be present or have an opportunity to be present when the tax is assessed against them. Nor does it require that taxes shall be collected by a judicial proceeding.

2. SAME.—A statute which gives a tax-payer a right to enjoin its collection, and have the validity of the tax decided by a court of justice, is due process of law, notwithstanding it requires the party to give security in advance, as in other injunction cases.

In error to the Supreme Court of the State of Louisiana.

Mr. Justice MILLER delivered the opinion of the court:

The defendant in error, who was tax-collector of the state of Louisiana, for the parish of Carroll, seized property of the plaintiff in error, and was about to sell it for the payment of his license tax, as a person engaged in business liable to a tax of one hundred dollars. In accordance with the laws of Louisiana, plaintiff in error brought an action in the proper court of the state for the trespass, and in the same action obtained a temporary injunction against the sale of the property seized. Defendant pleaded that the seizure was for taxes due, and was what his duty as collector required him to do. On a full hearing, the court sustained the defense, and gave a judgment under the statute against plaintiff and his sureties on the bond for double the amount of the tax and for costs. Plaintiff thereupon took an appeal to the Supreme Court of Louisiana, and in his petition for appeal alleges that the law of Louisiana, under which proceedings of defendant were had, was void, because in conflict with the constitutions of Louisiana and of the United States, and, as he now argues, is specifically opposed to the provision of the 14th Amendment of the latter, which declares that no state shall deprive any person of life, liberty or property without due process of law.

The judgment of the Supreme Court of Louisiana, to which the present writ of error is directed, affirming that of the inferior court, must be taken as conclusive on all the questions mooted in the record, except this one. It must, therefore, be conceded that plaintiff was liable to the tax, that if the law which authorized the collector to seize the property of plaintiff was valid, his proceedings under it were regular, and that the judgment of the court was sustained by the facts in the case.

Looking at the Louisiana statute here assailed—the act of March 14, 1873,—we feel bound to say that if it is void on the ground assumed, the revenue laws of nearly all the states will be found void for the same reason. The mode of assessing taxes in the states, by the federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary or unequal, or illegal. It must, under our constitution, be *lawfully* done.

But that does not mean, nor does the phrase "due process of law" mean by a *judicial proceeding*. The nation from which we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of taxes, though she passed through a successful revolution in resistance of unlawful taxation. We need not here go into the literature of that constitutional provision, because in any view that can be taken of it the statute under consideration does not violate it. It enacts that, when any person shall fail or refuse to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment, and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax-collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much as may be necessary to pay the tax and costs.

Another statute declares who is liable to this tax, and fixes the amount of it. The statute here complained of relates only to the manner of its collection.

Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not and never has been considered necessary to the validity of the tax. And the fact that most of the states now have boards of revisors of tax assessments does not prove that taxes levied without them are void.

Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party and recover back the money paid under duress, if the tax was illegal.

But however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceedings for its collection by process of injunction. See Fouqua's Code of Practice of Louisiana, articles 296 to 309 inclusive. The act of 1874 recognizes this right to an injunction, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction.

But it is said that this is not due course of law, because the judge granting the injunction is required to

take security of the applicant, and it is said that no remedial process can be within the meaning of the constitution which requires such a bond as a condition precedent to its issue.

It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court, or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

The judgment of the Supreme Court of Louisiana is affirmed.

PRACTICE—VERDICT—INTEREST.

GIBSON v. THE CINCINNATI ENQUIRER CO.

United States Circuit Court, Southern District of Ohio.

Before Hon. PHILIP B. SWING, District Judge.

1. VERDICT — MOTION FOR NEW TRIAL — INTEREST.— Where a verdict is rendered in favor of the plaintiff, judgment upon which is delayed by the filing of a motion for a new trial by the defendant, upon the overruling of the motion, the plaintiff is entitled to judgment for the amount of the verdict, with interest from the date of its rendition.

2. THE RULE APPLIES as well to actions of *tort*, as to those upon contracts.

The facts are fully stated in the opinion of the court.

SWING, J.:

The plaintiff brought his action for libel against the defendant, and on the 16th day of November, 1876, the jury rendered a verdict in his favor for the sum of $3,875. On the 17th day of November, 1876, the defendant filed a motion for a new trial. This motion was argued by counsel, and submitted to the court at the February Term, 1877, and on the 15th day of October the court overruled the motion for a new trial, and ordered judgment to be entered upon the verdict for the amount thereof, with interest from the 3d day of October, 1876, being the first day of the term at which the verdict was rendered. See 5 Cent. L. J. 380, for a report of the opinion on that motion. On the 17th day of October, 1877, the defendant filed a motion to modify the judgment, for the reason that no interest should have been allowed upon the verdict until judgment was entered thereon.

It is insisted by the defendant that interest is the creature of the statute, and that this case does not come within its provisions; that the cause of action was not founded upon contract, but was an action for a tort, and that in such cases interest is only recoverable from the date of the judgment.

I think the Supreme Court of Ohio in Haag *et al.* v. Zanesville Canal Co., 5 Ohio, 416, settled the doctrine that interest may be allowed as well in actions of tort as in those upon contracts. In that case, it is said that a jury may calculate interest upon the amount of damages actually sustained, and add it to their verdict. If the jury, in fixing the amount due from the defendant to plaintiff, may give to him interest, certainly the law should give him interest upon the sum which they have returned in his favor, from the date of their verdict. And the Supreme Court of Virginia, in Lewis v. Arnold, 13 Grattan, 464, hold that in regard to interest upon the verdict there is no difference, in principle, between verdicts in actions for torts and upon contracts.

Upon the question of the right of the plaintiff to interest upon the verdict, I can see no difference between a verdict in an action for a tort, and a verdict in actions sounding in contract—the verdict in either case fixed the amount due at the time of its rendition, and that amount the party is entitled to have paid him as of that date—and if the payment is delayed him by the act of the defendant, he ought to have interest. Such has been the practice of this court, and such seems to be the current of authority.

In Sprant v. Cutter, Wright, 157, interest was allowed upon an award from its date, and the court says: "And if it were the verdict of a jury, and judgment had been delayed, we should allow interest if asked." By the statute of Maine in relation to occupying claimants, it is provided that the court shall render for *the sum estimated by the jury*, but the supreme court of the state, in Winthrop v. Curtis, 4 Greenleaf, 297, held that the party was entitled to interest from the date of the verdict. The statute of New Hampshire, as ours, allows interest upon judgments without distinction as to the nature of the action in which the judgment is rendered; and the supreme court of that state, in Johnston v. Atlantic & St. Lawrence R. R. Co., 43 N. H. 410, say: "No solid reason can be given for withholding interest between the finding of the jury and the rendering of the judgment," but inasmuch as the court below had refused interest, and no exception had been taken to the ruling, the writ of review was dismissed. The rule of the Supreme Court of Connecticut in relation to motion for new trials, is, in substance, that where execution is stayed by reason of reserving a cause on motion for new trial, if judgment be not reversed, interest shall be added to the judgment from the time of the stay. 18 Conn. 575. In Weed v. Weed, 25 Conn. 494, a verdict was rendered in favor of the plaintiff for $745.85. A motion for a new trial was made by the defendant. Sometime afterward the court granted the motion unless plaintiff would remit $117.00. Plaintiff remitted, and the court rendered judgment upon the verdict for the balance, including interest from the date of the verdict. The case was taken to the supreme court, and the judgment was affirmed. In Bull v. Testchum, 2 Denio, 188, the court recognize the doctrine that at common law the plaintiff was entitled to interest on the verdict where delay of the entry of the judgment was occasioned by the defendant. The same doctrine is held in Vredenbergh v. Hallet & Bowne, 1 Johnson's Cases, 27; People v. Gaines, 1 Johns. R. 343; Lord v. Mayor of N. Y., 3 Hill, 430. In Rheims v. Robbins, 20 Iowa, 41, the court held that the interest should have been computed upon the verdict from the time when judgment should have been rendered, thus recognizing the right to interest before judgment. In Renther v. The State, 3 Ind. 86, the court says that judgment upon an award may properly include interest from the date of the award to the date of the judgment. In Buchanan v. Davis, 28 Penn. St. 211, the award was filed May 17th, 1856, and judgment was rendered upon it at the December Term, 1856, execution issued for judgment with interest from date of filing the award. The court say, "The award made persuant to the submission, would, like a verdict, draw interest from the date of its entry, and there is, therefore, no objection to the *fi. fa.*"

I am aware that a different doctrine was announced by that court in Felsey v. Murphy, 30 Penn. St. 340, but Judge Strong, in delivering the opinion of the court in the subsequent case of Irvin *et al.* v. Hazelton, 37 Penn. St. 465, reviews the decision of the court in Felsey v. Murphy, and says that it decides nothing more than that "a judgment entered generally operated from the day of its entry, so as to carry interest only from that time," and holds in the case before the court that there was not error in the court below in entering

judgment with interest from the date of the verdict.

In North Carolina, in Devereaux v. Buerguin, 11 Iredell, 491, it was held that interest was not allowable on an award; and in Louisiana, in Burner v. Copley, 15 La. An. 504, it was held that in actions for damages, interest could not be allowed either upon verdicts or judgments. But these cases are certainly against the weight of authority; and I think, both upon principle and authority, that whenever judgment upon the verdict has been delayed by the action of the defendant, the plaintiff is entitled to interest from the date of the verdict.

The judgment, however, in this case is wrong in this, that it is for interest from the first day of the term, when it should have been only from the day of the rendition of the verdict. It is true that for many purposes the term is regarded as but one day, and in all actions sounding in contract, interest, in this court, is computed to the first day of the term only, so that it it entirely proper that the verdicts and judgments should draw interest from the first day of the term. But in actions of tort, such as the present, where the jury were not directed to compute the amount which they should find in favor of the plaintiff as of the first day of the term, the judgment should have been for the amount of the verdict with interest from the date of its rendition.

The judgment will be modified in accordance with this opinion.

POWER OF CITIES TO CONTRACT INDEBTEDNESS—INJUNCTION.

CITY OF SPRINGFIELD v. EDWARDS.

Supreme Court of Illinois, January Term, 1877.

[Filed October 17, 1877.]

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

UNDER the Constitution of Illinois, a city can not become indebted for any purpose to an amount exceeding in the aggregate five *per cent.* on the value of its taxable property, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, and if a city for any purpose exceed the constitutional limitation, it may be enforced at the suit of any citizen and tax-payer, and such plaintiff need not show that he is injured by the acts complained of otherwise than in common with all the other tax-payers of the city.

Error to Sangamon County.

SCHOLFIELD, J., delivered the opinion of the court:

This was a bill in chancery by a citizen and taxpayer of the city of Springfield, to enjoin the municipal authorities of that city from incurring indebtedness and levying and collecting taxes, in violation of the city charter and the constitution of the state.

The decree finds, as facts proved which support the material allegations of the bill, that at no time since the adoption of the present constitution has the debt of the city been less than $850,000; and that the taxable property therein, as ascertained by assessment for state and county taxes, has, at no time during that period, exceeded $6,000,000; but that, notwithstanding this, the city has incurred indebtedness aggregating as follows: on the 1st of March, 1871, $4,171.89; on the 1st of March, 1872, $51,189.02; on the 1st of March, 1873, $70,249.91; on the 1st of March, 1874, $101,914.90.

It further finds that money was borrowed by the city for which warrants were issued amounting to $97,680; that also the further sum of $34,601.81 was borrowed by the city for which bonds were issued amounting to $37,000,00, when the interest of the outstanding indebtedness of the city for that and previous years amounted to not less than $70,000.00 per annum, and the revenue for the ordinary taxes of the preceeding year amounted to $81,066.25; that in said loans to the city for which warrants were issued, the warrants were made payable at a future day, and interest at ten per cent. per annum was taken out in advance, and it was provided, if the warrants were not paid when due, they should bear ten per cent. interest until paid; that said warrants were issued when there were no funds in the treasury for their payment; that appropriations made by the city counsel for the payment of interest for improvements and for city expenses, exceeded the amount of the whole ordinary revenue of the city for the fiscal year immediately preceding, and that money had been paid out of the treasury of the city for which no appropriations by ordinance were made. The decree perpetually enjoins the municipal authorities in the following language, "from incurring any indebtedness in any manner or for any purpose including existing indebtedness, in the aggregate exceeding five per centum on the valuation of the taxable property in said city, to be ascertained by the last assessment for state and county taxes, previous to the incurring of any additional indebtedness, and from making in any fiscal year appropriations or levying taxes for the payment of interest, for improvements and for city expenses in excess of the ordinary revenue of the fiscal year immediately preceding, unless in the payment of interest or public debts of the city they shall provide according to law, by taxation or otherwise, some additional fund out of which such appropriation may be made to meet such indebtedness; or from issuing any warrant or authorizing their issue for the payment of any money when there are no means in the city treasury for their payment, or for issuing the same to bear interest, or to become due at a future day, without by ordinance making appropriation therefor, or from assessing and collecting taxes for the year 1874 in any other manner than is prescribed for under the general revenue laws of the state for the assessment and collection of taxes; or from borrowing money when the interest on the outstanding indebtedness shall exceed the one-half of the city revenue, arising from the ordinary taxes within the city for the year immediately preceding," etc.

It is provided by § 12, art. 9 of the present Constitution, that "No county, city, township, school district or municipal corporation shall be allowed to become indebted in any manner or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." * * *

By the first clause of section 4, art. 5, of the "act to reduce the act incorporating the city of Springfield and the several acts amendatory thereof, into one act, and to amend the same" approved March 2, 1854 Laws of 1854, p. 44, it is enacted: "The city council * * * shall have power * * * to borrow money on the credit of the city, and issue the bonds of the city there-

for; but no sum of money shall be borrowed at a higher rate of interest than the rate allowed by law; nor shall a quarter sum or sums be borrowed, or at any time outstanding, the interest upon the aggregate of which shall exceed the one-half of the city revenue arising from the ordinary taxes within the city for the year immediately preceding, and no bonds shall be issued or negotiated at less than par value. The appropriations of the city council for payment of interest, for improvements, and for city expenses, during any one fiscal year, shall not exceed the amount of the whole ordinary revenue of the city for the fiscal year immediately preceding; but the city council may apply any surplus money in the treasury to the extinguishment of the city debt, or to the creation of a sinking fund for that purpose, or to the carrying on of the public works of the city, or to the contingent fund for the contingent expenses of the city. By the 13th section of "an act to amend the charter of the city of Springfield," approved February 21, 1861, Private Laws of 1861, p. 289, the comptroller of the city is required, in the month of April in each year, to submit to the council, among other reports, one showing the aggregate increase of the preceding fiscal year from all sources, and it is provided that "in no event shall the city council make the current appropriations of any year exceed in amount the income of the city during the preceding year, as ascertained by the comptroller in his said statement, unless in the payment of interest on the public debts of the city. They shall provide, according to law, by taxation or otherwise, some additional fund out of which such excess of appropriations may be made to meet such indebtedness."

And by the 16th section of the same act it is provided that "All warrants drawn upon the treasurer must be signed by the comptroller and countersigned by the mayor, stating therein the particular fund or appropriation to which the same is chargeable, and the person to whom payable, and no money shall be paid otherwise than upon such warrants so drawn."

It thus appears that the decree follows, with almost literal fidelity, the language of the constitution and that of the city charter combined, and the only question, therefore, that can arise is, does the case made show any necessity for such injunction?

We may dismiss the objection that the complainant does not show in his bill that he is injured by the acts complained of, otherwise than in common with all other tax-payers in the city, with the observation that it has been held in this state that such an injury is sufficient to entitle him to an injunction, and that the question is not open to further discussion. Colton *et al.* v. Hanchett *et al.*, 13 Ill. 615; Perry *et al.* v. Kinnear *et al.*, 42 *id.* 160; and Beauchamp v. Board of Supervisors, etc., *id.* 274.

Appellant contends that when liabilities are created and appropriations are made, which are within the limit of the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the constitution, and that temporary loans are not, when within the limits of the revenue expected to be realized.

The first branch of this position has support in Grant v. The City of Davenport *et al.*, 36 Iowa, 396; People Pacheco, 7 Cal. 175; Koppekeas v. State Capital Comms., *id.* 253; The State v. McAuley, 15 *id.* 455; The State v. Medberry *et al.*, 7 Ohio St. 522; and State v. Mayor, 23 La. An. 358.

These cases maintain the doctrine that revenue may be appropriated in anticipation of their receipt as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence.

In considering what construction shall be given to a constitution or a statute, we are to resort to the natural signification of the words employed, in the order and grammatical arrangement in which they are place; and if, when thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the instrument, then such meaning is the only one we are at liberty to say was intended to be conveyed. There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution. The prohibition is against becoming indebted —that is, voluntarily incurring a legal liability to pay, "*in any manner or for any purpose*," when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey.

A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute; the debt exists, and it differs from a present qualified promise to pay only in the *manner* by which the indebtedness was incurred. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else. In this view, we are only prepared to yield our assent to the rule recognized by the authorities referred to, with this qualification: 1st. The tax appropriated must, at the time, be actually levied. 2d. By the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment, when collected must operate to prevent any liability to accrue on the contract against the corporation.

The principle, as we understand, is, there is in such a case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order on the treasury is issued and accepted for its payment, when collected, the transaction is closed on the part of the corporation, leaving no future obligation, either absolute or contingent upon it, whereby its debt may be increased.

But until a tax is levied, there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future, for the benefit of a particular individual, necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy. If the making of the appropriation and issuing and accepting the warrant for its payment, does not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt.

Where a warrant or order payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished, or to be furnished, so that there is, in fact, but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the

appropriation—but obviously for any failure in that regard, the remedy must be against the officers and not against the corporation for otherwise, a contingent debt would, in this way, be incurred by the corporation.

The facts here found as proved and about which there seems to be no dispute, show an increase in the city debt, in plain and palpable violation of the constitution each year since the adoption of that instrument. At no time since the adoption of the constitution has the outstanding indebtedness been less than five per centum on the value of the taxable property of the city as ascertained by the annual assessment for state and county purposes; but, to the reverse, it has constantly been largely in excess of that amount; and yet, its indebtedness was augmented March 1st, 1874, $4,171.89, March 1st, 1872, $51,189.02, March 1st, 1873, $70,249.91. March 1st, 1874, $101,914.90. It is impossible that this could have been for current expenses, and satisfied by appropriating to their payment the current revenues, as levied each year. If such expenses had been thus satisfied, there could have been no debt left standing; for, whether the appropriations were made at the beginning or end of the fiscal year could make no difference, since in either case, it must satisfy and discharge the current expenses for the year.

The facts found as proved, likewise show the borrowing of money and contracting to pay interest thereon, and the payment of money from the treasury in direct violation of the letter and spirit of the organic law of the city. This is indefensible. Those representing the city can exercise only such powers, in its name and its behalf, as are expressly conferred by its organic law, or as are incidental and necessary to carry into effect the object of the incorporation. Much less can any power be exercised or act done, which is forbidden by statute, Dillon on Municipal Corporations, § 55.

Objection is urged that the court below erred in the proceedings by attachment against the aldermen for disobedience to the preliminary injunction. As no judgment was rendered against the aldermen on the final hearing, it is impossible to see how they have been predjudiced by the attachment. It has been held in numerous cases that neither an appeal or writ of error will lie on a simple interlocutory order.

The city collector was not authorized to proceed to collect the tax. Cooper v. The People *ex rel.* Sept. Term, 1876. The tax having been certified to the county clerk, should have been collected by the same officers by which state and county taxes are collected.

We see no cause to disturb the decree, and it is accordingly affirmed. DECREE AFFIRMED

DICKEY, J.:

I can not concur in what is said in this opinion as to the extent of the limitations of the constitution. I think they are carried too far in this opinion. At present my other duties deprive me of the time necessary to the preparation of a statement of my views. If circumstances permit, I may hereafter file in this case a separate opinion.

BOOK NOTICES.

MISSOURI APPEAL REPORTS.—Cases Argued and Determined in the St. Louis Court of Appeals of the State of Missouri. Reported by A. MOORE BERRY, Official Reporter. Vol. 1. St. Louis: Soule, Thomas & Wentworth. 1877.

The St. Louis Court of Appeals is comparatively a new court, having been first established by the Constitution of 1875. Though an intermediate appellate court, it is not such for the whole state: its jurisdiction being confined to the city and county of St. Louis and the adjoining counties of St. Charles, Lincoln and Warren. It was created to relieve the Supreme Court, and to effect this its judgment is final, except where the amount in dispute exceeds $2,500, and in certain other cases mentioned in the Constitution, Art. 6, section 12.

The decisions embraced in these volumes are those announced from January 10th, 1876, to April 10th, 1876. All the opinions filed during that time have been printed in the first volume. At this rate we would have to expect four volumes a year from this court, and we are therefore pleased to see the announcement in the preface that the future volumes will contain such opinians only as the judges of the court shall select for publication. The cases are well reported, the syllabi being comprehensive, and the cases cited by counsel being, as a rule, given. The printing and binding are excellent. In every respect the difference between the present volume and a volume of the supreme court reports of this state is very striking. Though the title selected by the reporter may be open to some criticism, Mo. (App.) will be a handier way of citing these reports than any title which could have been given to the series.

BURROUGHS ON TAXATION, FEDERAL, STATE AND MUNICIPAL. A Treatise on the Law of Taxation as Imposed by the States and their Municipalities, or other Subdivisions, and as Exercised by the Government of the United States, particularly in the Customs and Internal Revenue. By W. H. BURROUGHS. New York: Baker, Voorhis & Co. 1877. pp. 805.

Of late years, more than ever before, questions concerning the Taxing Power, its nature, scope and limitations and manner of its exercise have come before the judicial tribunals for settlement. Many years ago, Mr. Blackwell wrote a treatise on Tax Titles. The purpose of that work is very correctly indicated by its title. It discusses the general doctrine of taxation indeed, but discusses it incidentally and subordinately to the main design. Within the past twenty years, the public burdens in the form of taxes, National, State, Municipal and Local have greatly increased, and their combined weight has been grievously felt. One result of this has been that the taxpayer has sought relief from the courts much more frequently than formerly. The intellect and ingenuity of the bar have been stimulated, and the nature of the power to tax and the limitations on that power as expressed in the constitutions, or necessarily implied, have been examined by counsel and by the courts with a thoroughness never before attempted. Cases almost innumberable have arisen in the courts of the states and in those of the general government, and as might have been expected, the intrinsic difficulties of the subject have led to great diversity and conflict of judical judgment. Some of the most important questions concerning taxation have been recently determined by the Supreme Court of the United States, and they have been determined upon principles which must be accepted, for they rest upon solid grounds of reason and public policy. The existing state of the law is very satisfactorily mirrored by the author.

The practical importance of the subject is further seen in the circumstance that within the past three years Mr. Hilliard and Judge Cooley have each produced a work upon the same subject as that chosen by Judge Burroughs. We can not enter upon a critical description and comparision of these rival treatises. It must suffice to say that they differ somewhat as to their general scope and very greatly as respects the mode of treatment. For example, the work under consideration gives special prominence to Municipal and Federal Taxation—over 200 pages being devoted to the subject last named. It bears abundant evidence that it has been written with care and deliberation.

It is a valuable addition to the existing works on the same subject. It is comprehensive and exhaustive, and its full citation and statement of adjudged cases will be especially prized by the practising lawyer who has little time and less opportunity for independent research and investigation. D.

NOTES OF RECENT DECISIONS.

ESTOPPEL—BY POSITIVE ACT OF PARTY IN IGNORANCE OF LAW WITHOUT FRAUD—MISTAKE OF TITLE—EXECUTOR.—*Miller's Appeal.* Supreme Court of Penn. 4 Weekly Notes, 405. Opinion by AGNEW, C. J.—1. Where the owner of land, by *a positive act*, induces another to purchase such land from a third person, such owner is estopped from setting up her title against the purchaser, although the parties have all acted *bona fide*, and in ignorance of the true state of the title. 2. Where an executor with power to sell, has by mistake sold the land of another, and the sale has been concurred in by the true owner of the land in such a manner as to work an estoppel, the purchase-money belongs to the true owner of the land, and the executor is not chargeable, as such, with it in his account.

CONFISCATION OF PROPERTY OF MUNICIPAL CORPORATION--PRACTICE--JUDGMENT—DEFAULT—FAILURE OF COUNSEL TO ENTER APPEARANCE WHERE JUDGE HAS EXPRESSED BIAS.—*Fairfax v. City of Alexandria.* Court of Appeals of Virginia, 4 Am. L. T. Rep. 517. Opinion by MONCURE, J.—1. In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney general are, that the method of seizure of the property shall be conformed, as nearly as may be, to the state law, if there be such. When, therefore, the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be upon the mayor or other officer named in the Virginia statute; and notice given to the auditor of the corporation is of no effect, and the judgment based upon such notice is null and void. 2. On such a proceeding against F., the counsel of F. does not enter an appearance for him, because in three cases against the same party, before the same judge, he was informed by the judge from the bench, that it was a rule of his court not to allow an appearance and defense by rebels and traitors; and in these cases the appearence and defense were stricken from the cases; and this a short time before the last case was acted on. The counsel was not in default for failing to enter an appearance for F.; and the decree of confiscation is void, and of no effect.

CONTRACT TO PAY INTEREST ON MONEY LOANED —COMPOUND INTEREST.—*Dyar v. Slingerland.* Supreme Court of Minnesota. Opinion by GILFILLAN, C. J. Upon a contract to pay money with interest, payable at stated times, interest on such stipulated interest after it falls due is not allowed. "Althongh the weight of authorities is decidedly against allowing interest upon interest, yet if the question might be considered open in this state, we could see no satisfactory reason, based either on principle or public policy, why it might not be allowed. But this court decided in Mason *et al.* v. Callender *et al.*, 2 Minn. 350, that interest on interest can not be allowed. After referring to and approving of the decision of Chancellor Kent, in the case of State of Connecticut v. Jackson, 1 Johns. Ch. 13, in which he, upon a review of all the authorities to that time, disallowed such interest, and afirmed that a prior agreement to pay interest on interest, to become due would be void; but that an agreement made after interest became due, that it should bear interest, might be sustained, this court said 'there is no limit to the authorities on this point. The principle established is, that a contract to pay interest on interest, which is not due, is inequitable and will not be enforced; while on the other hand, if the interest is due, it may be added to the principal, and a contract to pay interest on such new principal will be enforced.' The case of Mason *et al.* v. Callender *et al.*, was an action upon a note which, by its terms, was to bear interest till due, at the rate of three per cent. per month, and after due, interest on the principal and interest, at the rate of five per cent. per month. The court below allowed the increased rate of interest after maturity, on both principal and interest. The questions before this court were not only, what rate should be allowed after maturity, but whether that rate should be allowed on interest as well as on principal; and both were decided, although the rule as to the rate was in Talcott v. Marston, 3 Minn. 339, varied; the decision of the former case upon all other points, was in the latter case affirmed, p. 344. The rule thus laid down and approved, has not since been questioned in this state, and it may be regarded here as the rule, certainly where, as in this case, the creditor has made no demand for the interest. Whether a demand would justify the allowance of interest on the interest demanded, we do not decide."

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

October Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, " ISAAC MARSTON, " B. F. GRAVES, } Associate Justices.

RIGHT TO COMPENSATION FOR UNAUTHORIZED LABOR ON ANOTHER'S PROPERTY.—Both parties owned adjoining tract of timbered land, and plaintiffs entering on defendant's tract, supposing it to be their own, cut, hauled away and piled a quantity of cord wood, which defendant afterwards took possession of. *Held*, that plaintiffs could not recover for the expense incurred by them. Opinion by COOLEY, C. J.—*Isle Royal Mining Co. v. Hertin et al.*

LIEN ON LOGS—PURCHASER'S RIGHTS—CONSTRUCTION OF ACT.—Section 1 of the log-lien act, 1 L. 1873, p. 466, enacts that any person performing labor in felling, cutting, etc.. any logs in this state shall have a lien thereon for the amount due, and that "the same shall take precedence of all other claims thereon." Sections 2 and 3 provide that no such debt shall remain a lien unless a petition or statement thereof be filed in the clerk's office of the circuit court within thirty days after the completion of such labor, and suit must be commenced within three months. *Held*, that the act must be rigidly construed, and that, although the petition be filed within the thirty days, the lien will not stand as against one who, after completion of the work and before the filing of the petition, purchases from the debtor, the claimant not being in possession. Opinion by GRAVES, J.—*Haifley v. Haynes.*

MANDAMUS — IRREGULAR EXPULSION FROM A SOCIETY—RESTORATION NOT ALWAYS ORDERED.—Relator claimed that he had been unjustly and irregularly expelled from a religious society. *Held*, that although the facts stated in respondent's answer lead to the opinion that the expulsion was irregular, yet as relator's demurrer to the answer admits that the society has no property, that relator had acted in hostility to its interests, that his restoration would destroy it, and that if restored he might at once be put out, the dis-

cretion of the court will be best exercised by refusing a peremptory *mandamus*. State v. Sunsitanian Portugese Society, 15 La. An. 73; The King v. Griffith, 5 Barn. & Ald. 731; Rex v. Mayor, etc., of Axbridge, 2 Cowper, 523; Rex v. Mayor, etc., of London, 2 Term R. 177; *Ex parte* Paine, 1 Hill, 665. Opinion by GRAVES, J.—*People ex rel. Meister v. Anshei Chesed Hebrew Congregation of Bay City.*

INCORPORATION IS NOT CONCLUSIVELY EVIDENCED BY MEETINGS AND ELECTIONS—WHEN OFFICER IS ESTOPPED FROM DISPUTING INCORPORATION.—A church in a suit against its treasurer sought to establish its corporate existence by showing that the associates held the ordinary meetings of a religious society, and that they elected officers, among whom was defendant. The court below held the evidence sufficient, regarding defendant as estopped by accepting the office of treasurer, from disputing the incorporation. *Held*, that this was error, as not any of the acts of the associates were unmistakably corporate acts. Every act done, including the election, was just as consistent with the existence of an unincorporated association as of a corporate body. Indeed, the evidence below, taken together, tended very strongly to show that no corporation had been formed. Under such circumstances no one is estopped from denying the incorporation. Estoppels never arise from ambiguous facts; they must be established by those which are unequivocal. See Bennett v. Dean, 35 Mich. 306. Per CURIAM. *Fredenburgh v. Lyon Lake M. E. Church.*

PEREMPTORY CHALLENGES OF JURORS IN CIVIL ACTION BY DEFENDANTS' PLEADING SEVERALLY—PREVIOUS NEGOTIATION AND AFFIRMATION OF SIMILAR NOTES ADMISSIBLE TO SUPPORT EVIDENCE OF THIRD PERSON'S AUTHORITY TO USE DEFENDANTS' NAMES ON COMMERCIAL PAPER—A PARTNER HAS NO IMPLIED AUTHORITY TO PUT HIS CO-PARTNER'S NAME ON A NOTE UNDER DIFFERENT LEGAL OBLIGATIONS FROM HIS OWN.—This suit was on numerous promissory notes, whereon the defendants' names appeared in connection with one Winsor's, but in varying situations—sometimes as joint makers or joint indorsers, sometimes one being maker and another indorser, etc. Defendants pleaded separately by different attorneys, and denied on oath the execution of the papers by them respectively. I. On the impaneling of the jury a question arose as to peremptory challenges. By 2 Comp. L. 1871, sec. 6027, "In all civil cases each party may challenge, peremptorily, two jurors." Here one defendant peremptorily challenged two, and the other then challenged one, but the court overruled the challenge on the ground that the two defendants constituted but one party in the sense of the statute, and that this right was now exhausted. This ruling is supported by Bibb v. Reid, 3 Ala. 88; Stone v. Legree, 11 Allen, 568; Ladowsky v. McGee, 491 Marsh, 267. *Held*, I. The statute must be construed to allow the right of two separate challenges to each defendant who pleads separately by different counsel. Where the defendants, as in Stone v. Legree, unite in one issue, presented by the same counsel, and make a joint defense, they are but one party, and a challenge by one is in behalf of all; but where they plead severally, insuperable difficulties must arise if only two challenges are allowed to all. If they are compelled to agree on any challenge, the very impossibility of doing so might defeat the privilege altogether, and where defendants are joined whose interests are antagonistic, as is sometimes the case, a refusal to unite in a challenge would be very likely not to have in view the common interest of all the defendants. But if they are not required to agree upon challenges, then they must be allowed the privilege severally, and it is gone so soon as the two who are permitted to challenge first have done so. Thus part of the defendants would be deprived of their statutory privilege altogether. II. As to the admission of evidence to connect defendants with the disputed paper. Their names had put thereto by Winsor, who imitated their signatures. Plaintiff claimed that many similar notes, signed or indorsed in the same way, had previously been put afloat by Winsor, some of which were brought to defendant's notice without being repudiated by them, and plaintiff was allowed to show this, as the basis for an inference that what had been done by Winsor was authorized, and in support of the evidence of Winsor that what he was doing was known to defendants from the beginning. The authorities directly bearing on this point are not very satisfactory or conclusive. See Barber v. Gingell, 3 Esp. 60; Carle v. Taylor, Lloyd & W. Merc. Cas. 178, cited in Parson's Notes & Bills, 101; Weed v, Carpenter, 4 Wend. 219; Greenfield Bank v. Crafts, 4 Allen, 447; Forsyth v. Day, 46 Me. 176; St. John v. Parke. 9 Port. 428. *Held*, 1. That while it was not admissible to prove, as an independent fact, the previous existence and negotiation of other paper like this in suit, yet if it can be further shown that any such paper was brought to the knowledge of the defendants who did not repudiate it, but treated it as valid, the fact would have a tendency not merely to show that that particular paper was authorized or sanctioned, but to strengthen and support any evidence which may be given of authority from defendants to Winsor to make use of their names in executing such paper thereafter. It would not be conclusive, but it would have a legitimate tendency to support the more direct evidence of Winsor's agency. *Held*, 2. That the court below erred in the instruction that if defendants, *one or both of them*, assented to the making of these notes, or to their negotiation by Winsor, that would be sufficient. The record shows no authority which either defendant had from the other to consent that his individual name might be put by Winsor as maker or indorser upon any paper. and if any such authority could be implied from this joint relation in any business transactions, as partners or otherwise, it is clear that none could be implied for one defendant to authorize a third party to so make them parties to commercial paper as that their apparent interests and legal obligations would be different; yet on one of these notes one defendant appears as maker, with the other as indorser or surety. Opinion by COOLEY, C. J.—*Stross & Hudson v. Hinchman.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

Supreme Court Commission of Ohio, December Term, 1876.—*Filed October*, 1877.

HON. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT, }
" D. T. WRIGHT, } Justices.
" W. W. JOHNSON, }
" T. Q. ASHBURN, }

LESSOR AND LESSEE.—1. A lessee remains liable on his express agreement to pay rent, notwithstanding he may have assigned his lease with the lessor's assent, and the lessor has accepted rent from the assignee. 2. But where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee, with the assent of the lessor, extinguishes the privity of estate between the lessor and lessee, and the consequent implied liability of the lessee to pay rent. 3. The assent of the lessor to such assignment, where nothing to the contrary appears, may be implied from his charging the rent to the new tenant, and accepting payment thereof from him. Opinion by DAY, C. J.—*Harmony Lodge v. White.*

NEGLECT TO DELIVER TELEGRAM — DAMAGES — PLEADING.—1. In case of a breach of contract, actual damages not being proved, nominal damages may be recovered. 2. In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made. 3. If the telegraph company is in default, but their default is made mischievous to a plaintiff only by operation of some other intervening cause, such as the dishonesty of a third person, the rule "*causa proxima non remota spectatur*" applies, and the company can not be made responsible for the loss occasioned by the act of such third person. 4. Defendant having filed an answer to the petition, and plaintiff thereupon filing an amended petition, to which defendant answers without making the original answer part of the second answer, the case stands for trial upon the amended pleadings, and the original pleadings are disregarded. Judgment reversed. Opinion by WRIGHT, J,—*First Nat. Bank of Barnesville v. W. U. Tel. Co.*

ASSESSMENT—CONSTRUCTION OF ROADS — COVENANT IN DEED.—1. An assessment upon lands, made under the provisions of the act of March 29, 1867, 64 O. L., 80, authorizing county commissioners to construct roads, etc., becomes a lien upon the land from the time the assessment is made against the land. 2. When a deed, executed subsequent to such assessment, and whilst a part thereof remains unpaid, contains a covenant "against all claims whatsoever," such assessment is an incumbrance on the land conveyed by the deed, within the scope of the covenant, and for such breach an action will lie. 3. In an action by the vendor against the vendee, to foreclose a mortgage given to secure a balance of purchase money, the vendee may set up as a defense in such action, by way of counterclaim, under section 557 of the Code, as amended April 18, 1867, 67, O. L., 116. an unpaid assessment, made under the provisions of the act of March 29, 1867, upon the land at the time of the execution of the deed to the vendee, and have the amount remaining unpaid, with interest, deducted from the unpaid purchase money. Judgment reversed, and the cause remanded. Opinion by ASHBURN, J.—*Craig v. Heis.*

LEASE OF PUBLIC WORKS.—1. Under section 18 of "An Act to provide for leasing the public works of the state," passed May 8, 1861, S. & S. 61, the state reserved to itself the right, as against the lessees of the public works, to grant to the city of Cincinnati permission to enter upon and improve as a public highway and for sewerage purposes, that part of the Miami and Erie canal which extends from the east side of Broadway, in said city, to the Ohio river. 2. The rights acquired by the lessees of the public works, under the provisions of said act of 1861, to the surplus water connected with said section of the canal, or appertaining thereto, and owned by the state, for the purpose of being used therewith, and also the right to "additional surplus water," were held by said lessees, subject to be divested by the exercise of the power reserved to the state by the 18th section of said act, to make such grant to the city for a public highway and for sewerage purposes. 3. The right to surplus water and to lease the same for private uses, is an incident of the public use of the canal for purposes of navigation. The canals of the state were authorized, contracted and maintained for public purposes, and not to afford water power, to be leased or sold, for private use. The latter use is subordinate, and the right to the same may be terminated whenever the state, in the exercise of its discretion, abandons or relinquishes the public use. 4. By the act of March 23, 1863 (1 Sayler Stat. 379) the state exercised the power reserved to itself by the 18th section of the act of 1861, and thereby granted authority and permission to said city to enter upon, improve and occupy forever, as a public highway and for sewerage purposes, said portion of the canal, according to a plan of improvement to be approved by the board of public works. This act provided that said grants should be subject to all outstanding rights or claims, if any, with which it may conflict; that it shall not extend to the revenues derived from water privileges; that the city, in the use of the same, should not obstruct the flow of water through the granted portion nor injure the present supply of water, and should do no work until the plan for the improvement by the city should be approved by the board of public works. *Held*, that these reservations and conditions, annexed to the grant to the city, were not intended to reserve to the state, nor to the lessees of the public works, the right, after that part of the canal had been abandoned, and after the title had vested in the city, and it was in possession, engaged in making the intended improvement according to an approved plan to create new water rights not therefore existing. 5. This grant and the construction, by the city, of an avenue and sewer along the line of the land, upon a plan of improvement, approved by the board of public works, in such manner that the canal could no longer be used for purposes of navigation, was an abandonment of it by the state for the public uses for which it was held; and this, by operation of law, was a surrender, by the state, of the incidental right to the surplus water along the part so abandoned, not expressly saved, as outstanding rights or claims, under contracts existing at the time of such abandonment under the reservation and conditions of the act of March 24, 1863, Sayler's Stat., vol. 1, p. 379. 6. Hence a conveyance by the state and the lessees of the public works of such water-power, made after the grant to the city, took effect, and after the state had abandoned that part of the canal for purposes of navigation, could not operate, to vest in the grantee a right to the same, paramount to that of the city to convert the part abandoned into a public highway and a sewer, upon a plan approved by the board of public works, which involved the destruction of such water-power. Judgment affirmed. Opinion by JOHNSON, J.—*Little Miami Elevator Co. v. City of Cincinnati.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

AGREEMENT TO PAY TAXES—STATUTE OF FRAUDS.—A conveyed land to B by quit-claim deed, and at the same time agreed by parol to pay all back taxes then due on said land, as a part of the purchase price of certain other land conveyed by B to A. *Held*, that the promise was not within the statute of frauds, as being the promise to pay the debt of another, and did not need to be in writing. It was virtually but the promise of A to pay a part of his own debt by the payment of such taxes. Opinion by HOWK, J.—*Headrick v. Wiseheart.*

INDIVIDUAL LIABILILY OF A COUNTY OFFICER FOR MONEY RECEIVED.—If a person receive money from one person to pay to a third, the promise, express or implied, inures to the benefit of such third person, who may maintain an action for the money; and where the clerk of a court received money which the law did not authorize him to receive in his official capacity, he received the money in his individual capacity, and in that

capacity was liable to the person to whom it belonged. Opinion by PERKINS, C. J.—*Hunt v. Milligan.*

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF THIRD PERSONS.—Where a ditch has been dug along or across a street or alley, within the corporate limits of a town or city, and has been left in an unsafe condition, such municipal corporation can not escape liability for the damages occasioned by such ditch, upon the plea that the ditch was dug or left by a third party without its license or authority. It is the duty of the municipal corporations, in such a case, to put the street or alley in a safe condition for its ordinary use by the public, and if in so doing it incurs expense, such third party should be held liable to such town or city for the reasonable expenses thus incurred. Opinion by HOWK, J.—*Town of Centreville v. Woods et al.*

STATUTE OF LIMITATIONS — CONCEALMENT OF CRIME.—The words "conceals the facts of the crime," in the statute must be held to mean the concealment of the fact that a crime has been committed, unconnected with the fact that the accused is the perpetrator; and the concealment must be the result of some positive act of the accused, calculated to prevent a discovery of the commission of the offense with which he stands charged. And where an indictment for fornication charged the concealment of the crime, by the defendant "publicly acknowledging and claiming the said Mary Watson to be his wife," the allegation did not show any such positive act of concealment as would take the case out of the statute of limitations. Opinion by BIDDLE, J.—*Robinson v. The State.*

BOND FOR PAYMENT OF MONEY—CONDITIONAL TENDER.—Suit on a bond, against the maker thereof. The bond provided that in consideration of two shares in the capital stock of the G. R. & I. R. R. Co., to be delivered upon payment of the sum specified, the maker would pay the bearer $200, as the work on the road-bed of said railroad should progress, according to monthly estimates, the whole sum to be due when the road-bed should be ready for the rails. *Held*, that if the action had been brought to recover any of the monthly installments, no tender of the stock would have been necessary, because the stock was to be delivered only upon payment of the whole sum, but as the action was for the whole sum it could not be maintained without a tender of the stock, on condition of payment, before the commencement of the suit. Opinion by WORDEN, J.—*Clark v. Continental Improvement Company.*

MANDATE—ESTOPPEL—WHEN PRIMA FACIE PRESUMPTION MAY BE DENIED BY PLEA.—1. A mandate will be awarded in favor of a railroad company requiring a city council to pass an ordinance for the issue of bonds to such company, in compliance with the petition of a majority of the resident freeholders of such city. 2. In such a suit an answer of the city, alleging that a majority of the freeholders had not signed the petition, was held bad on demurrer, on the ground that the answer contradicted the record of the city council, which showed that a committee of the council had reported the petition to be properly and sufficiently signed, but failed to show that the report had been adopted or in any manner acted on by the council. *Held*, 1. That if this was a suit by a *bona fide* holder of an issued bond, the presumption might arise that the council had concurred in the report of the committee, but in a suit to compel the issue of the bonds, the presumption at most was only a *prima facie* one, and might be denied by plea or answer. *Held*, 2. That the city council was not estopped to deny the fact alleged in the answer, because such an estoppel could only arise in favor of a party who had acted in good faith upon the fact of the passage of the resolution of the council. The answer should have been held good. Opinion by PERKINS, C. J.—*City of Kokomo v. The State ex rel. Adams.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1876—*November*, 1877.

Hon. JOHN WELCH, Chief Justice.
" WM. WHITE,
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
} Associate Justices.

APPEAL—UNDERTAKING — SURETIES.—Under section 38 of the probate court act, (S. & C. 1218), an undertaking in appeal signed by sufficient sureties is good without the signature of the appellant thereto. 2. Where the undertaking is defective in omitting, by mistake, some of the conditions required by the section, the court of common pleas has power to allow an amendment of the undertaking. Opinion by GILMORE, J.—*Johnson v. Johnson.*

ACTION AGAINST EXECUTOR—EVIDENCE.—In an action against an executor to recover for goods sold to the testator, the defense was that the testator's wife owned a stock of goods and carried on business on her own account, and that the goods in controversy were sold to her on her sole credit. *Held:* That it was not competent for the executor, as against the plaintiff, to prove that the widow took what was left of the stock at the death of the testator, and appropriated the same to her own use. Opinion by WHITE, J.—*Johnson v. Hawkins.*

LEVY OF ATTACHMENT—POWER OF SALE.—1. The levy of an attachment in an action against a devisee, will not defeat or prevent the execution of a power of sale, given by the testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale. 2. A testator devised his estate to his five children in equal shares, and authorized and empowered his executor to sell and convey all the real estate of which he died seized. A creditor of one of the devisees caused an attachment to be levied on an undivided fifth part of said real estate. Afterward the executor, in execution of the power, sold and conveyed all said real estate. *Held:* That the purchaser acquired title to the land conveyed, unaffected by the levy of the attachment. Opinion by BOYNTON, J.—*Smyth v. Anderson.*

CORPORATION—SUBSCRIPTION TO STOCK—LIABILITY.—E. subscribed for 40 shares of $50 each of the capital stock, consisting of $2,000,000 of the S. T. & P. R. R., agreeing to pay the amount subscribed in such installments as might from time to time be required by the directors of the company, under the provisions of the charter of said company and the laws governing the same, providing, however, that such subscription should not be binding until the aggregate sum of $800,000 in *bona fide* subscription should be taken to the capital stock between S. & T. was assumed. Subsequently by agreement between E. and the company, the sum of $700,000 was substituted for the $800,000. *Held*, that upon the *bona fide* subscription of $700,000 to the capital stock of the company between S. & T., E. became liable to assessment on the sum by him subscribed. Opinion by BOYNTON, J.—*Emmit v. S. T. & P. R. R.*

MANUFACTURING CORPORATIONS — POWERS OF UNDER STATUTE.—1. A statute should not receive a construction which makes it conflict with the Constitution, if a different interpretation is practicable. 2. By the act of March 25, 1870, entitled "An act to authorize manufacturing corporations to issue preferred

stock," vol. 67 O. L., p. 26, the legislature did not intend to authorize the creation of additional stockholders, and to exempt them from individual liability to creditors, but to enable such corporations, upon the terms in the act provided, to borrow money and guarantee its repayment, with the option on the part of the lenders to become stockholders. 3. Such corporations have power to borrow money for the prosecution of their legitimate business, and to secure its repayment by mortgage, independent of, and without any aid from, the provisions of said act. 4. Where a manufacturing corporation, professing to act under the provisions of said act, issued certificates of preferred stock, so-called, certifying that the corporation guaranteed to holders, the payment of four per cent. semi-annual dividends, and the final payment of the entire amount at a specified time, with the right to convert the preferred stock into common stock, and the company at the same time executed and delivered to a trustee its bond and mortgage to secure the holders of such certificates. *Held:* That the holders of the certificates did not thereby become stockholders or members of the corporation, but its creditors, and that as such creditors they had a lien upon the mortgage property superior to that of general creditors of the corporation, or of its assignees. Judgment affirmed. Opinion by WELCH, C. J.—*Burt, ass. v. Rattle.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

SLANDER—PRIVILEGED COMMUNICATION. — Upon grounds of public policy, communications which would otherwise be slanderous, are protected as privileged, if they are made in good faith, in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to justice the criminal. Opinion by MORTON, J.—*Eames v. Whittaker.*

TRUSTEE PROCESS—ASSIGNMENT OF WAGES. — Where the wages of the principal defendant, which the plaintiff seeks to hold by trustee process, have been assigned to the treasurer of a corporation, by an instrument in writing, the sole object of which was to secure the corporation for goods which it had previously sold, and which it might afterwards sell to the defendant, which assignment was duly recorded under St. 1865, c. 43, § 2, there being no excess in the hands of the alleged trustee over the amount due the corporation at the time of service of process, he can not be charged as trustee. Opinion by MORTON, J.—*Giles v. Ash.*

TRUSTEE PROCESS—ASSIGNMENT OF EARNINGS.—Where, in a trustee process, it appeared that the assignment, upon which the adverse claimant founded his title to the fund, was made without fraudulent purpose as security to the claimant for goods already furnished, and for such as should thereafter be furnished to the principal defendant by the claimant, there being no agreement by said defendant to buy goods to any specified amount, nor by the claimant to sell goods to any specified amount, it was *held* that the assignment was held "only as security for a debt," within the meaning of statute of 1865, c. 43, § 1, and that the plaintiff was entitled to hold the balance in the hands of the trustee, above the amount due the claimant at the time of the service of the writ, in the same manner, and with the same effect as if no assignment had existed. See Darling v. Andrews, 9 Allen, 106. Opinion by SOULE, J.—*Warren v. Sullivan.*

MILL ACT — PLEADING — EVIDENCE.—1. Upon a complaint under the mill act, every matter which shows that the complainant can not maintain his suit, except the question whether he has sustained any damages, must be pleaded in bar, and decided by the court before the issue of the warrant for a sheriff's jury. Gen. Sts., c. 149, § 8; Charles v. Porter, 10 Met. 37; Howard v. Proprietors of Locks and Canals, 12 Cush. 259; Darling v. Blackstone Manfg. Co., 16 Gray 182; Fitch v. Stevens, 4 Met. 426, distinguished. 2. Upon the trial of such complaint, one of the deeds referred to in the plaintiff's petition as the source of her title to the property alleged to have been damaged, was produced and read, and it appeared that it conveyed to the complainant a parcel containing about 55 acres, but gave no boundaries, but referred to the other deeds for a description of the premises therein granted, neither of which deeds were produced or read. The complainant called her husband, who testified, under objection, that he knew what land was conveyed in said deeds; that it was a parcel containg 55 to 60 acres, and extended to and was bounded by the middle of Mill river on one side, and was overflowed and damaged by the respondent's dam. *Held*, that the testimony of complainant's husband was admissible to identify the land overflowed. Opinion by GRAY, C. J.—*Hadley v. Citizens' Sav. Inst. of Woonsocket.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER,

EXEMPTION LAW.—1. Section 6 of the exemption law of 1868, (Gen. Stat. 474), which provides that "none of the personal property mentioned in this act shall be exempt from attachment or execution for the wages of any clerk, mechanic, laborer or servant," is constitutional and valid. Opinion by VALENTINE, J. All the justices concurring, Affirmed.—*McBride v. Ritz.*

ATTORNEY'S FEES.—1. A mortgage contained a stipulation that upon default in payment of the debt the mortgage should be "subject to foreclosure according to law, and that an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs, should be taxed against the mortgagor." *Held*, that where after suit brought, but before decree, the mortgagor paid the debt, interest and costs, the court committed no error in refusing to render judgment in favor of the mortgagee and against the mortgagor for fifty dollars' attorney fee or any part thereof, or in dismissing the action. Life Association v. Dale, 17 Kansas, 185, distinguished. Opinion by BREWER, J. All the justices concurring. Affirmed.—*Jennings v. McKay.*

VOLUNTARY APPEARANCE — JURISDICTION.—1. In an attachment proceeding before a justice of the peace, F. interposed a claim for the attached property. A jury was demanded and trial commenced, but before any verdict was returned the parties by written consent stipulated that the jury might be discharged, no further proceedings had before the justice and the matter certified to the district court for trial. The papers and records were transmitted to the district court, the parties appeared, a jury was empanneled and thereupon S. the attaching party, objected that the district court had no

jurisdiction. *Held*, that as the parties voluntarily appeared and submitted themselves to its jurisdiction, as no objection was made to the form of the proceedings, and as the question of the title to personal property is within the scope of its jurisdiction, the district court committed no error in overruling the objection. Opinion by BREWER, J. All the justices concurring. Affirmed.—*Shuster v. Finan.*

OFFICIAL TOWNSHIP BOND — EVIDENCE.—1. In April, 1871, N. was a justice of the peace of Franklin township, in Jackson County, and gave an official bond, with W. & S. as sureties. In June, 1872, in certain proceedings had before said N., as justice of the peace of Netawaka township, money was received by him which was not paid over to the party entitled. *Held*, in an action on said bond to recover such money, that in the absence of testimony, this court could not presume that there had been simply a change in the name of the township, and that the justice in June, 1872, held the same office as that for which he gave the bond in April, 1871, and that a judgment against the sureties must be reversed. 2. In an action against a justice to recover money received by him from a constable and not paid over to the party entitled thereto, the receipt given by the justice to the constable, and signed by the justice with his official title, is competent evidence to charge the justice, and admissible without further proof of its execution. Opinion by BREWER, J. All the justices concurring. Modified and reversed.—*Neal v. Keller.*

JURISDICTION.—1. M. brought an action against B. before a justice of the peace to recover the possession of personal property valued at fifteen dollars. Upon a jury trial judgment was rendered in favor of B., the defendant. Plaintiff appealed to the district court. In that court the parties appeared, a jury trial was had and upon that judgment was rendered in favor of the plaintiff. At the next term of the court the defendant moved to set aside the judgment and dismiss the appeal on the ground that under the statute no appeal could be taken from the judgment of a justice of the peace in cases tried by a jury, in which "neither party claimed in his bill of particulars a sum exceeding twenty dollars." No reasons were given for not raising the question of jurisdiction and former judgment at the trial. The motion was sustained. *Held*, that waiving the question as to the right of appeal in such cases, the court erred in sustaining the motion, and that the defendant was too late in presenting his objection. Shuster v. Finan, *ante*. Opinion by BREWER, J. All the justices concurring. Reversed.—*Miller v. Bogart.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF COLORADO.

April Term, 1877.

HON. HENRY C. THATCHER, Chief Justice.
" EBENEZER T. WELLS, } Associate Justices.
" SAMUEL H. ELBERT, }

WRIT OF ERROR VARIANT FROM RECORD—ERROR NOT GROUND FOR QUASHING WRIT.—1. A writ of error does not lie to the determinations of a court acting in a summary proceeding not according to the course of the common law. 2. The writ of error must not be variant from the record. The decree and proceeding below must be recited, according to the facts, and the character in which the plaintiffs in error sue, as heirs or otherwise, may be asserted in the *ad infuriam* clause. Under sec. 12 of the statute of amendments, the writ may, in these respects, be amended here if counsel desire. 3. What may be sufficient to reverse the judgment can never be cause to quash the writ of error. Opinion by WELLS, J.—*Vance's Heirs v. Rockwell et al.*

CHANCERY PLEADINGS—EFFECT OF REPLICATION TO PLEA—RES JUDICATA—IDENTITY OF SUITS.—1. When a plea is interposed in a chancery suit, the complainant should, if he would question the sufficiency of the plea in its form or substance, have the plea set down for hearing as to its sufficiency. By filing a replication to a plea he admits its sufficiency; and if the issue upon the plea is found for the defendant, and the plea goes to the whole bill, the bill must be dismissed. 2. The defendant filed the plea of *res judicata*, and upon inspection of the records of the two suits we find that the parties were the same, the right litigated was the same, the relief sought was the same in both suits. The only difference was that the acts complained of, in the second suit were a repetition of the same acts complained of in the first suit, but they were alleged to have been committed after the filing of the first bill. This can make no difference as to the right that was litigated. If the first act was not wrongful, or gave the complainant no right to relief, a repetition of the same act could not have a different effect. The renewal of the threats to invade the same right of the complainant, does not in any legal sense afford a distinct or different ground of action. A contrary doctrine would destroy the stability of all decrees granting or denying injunctive relief, and litigation upon adjudicated points in such cases would never cease. 3. Both bills presents the same issue, involving the same enquiry, viz: the right of the complainant to enjoin the city from occupying and using a certain lot for street purposes. The right or title of the complainants to the relief sought, being the issue determined by the allowance of the demurrer to the former bill, can not be re-litigated by bringing another bill. Opinion by THATCHER, C. J.—*City of Denver v. Lobenstein.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

AGENCY—INSURANCE.—Where an insurance company appoints an agent authorized to take risks, issue policies and represent the company in effecting insurance, and the agent by his acts or declarations, known and acquiesced in by the company, induces the public to believe he is vested with power necessary to do the act or waive the condition, the company is bound by the acts of such agent. Opinion by COLE, J.—*Fleming v. The Hartford Fire Ins. Co.*

VACATING JUDGMENT—NOTICE OF APPEAL.—1. The power of the circuit court to relieve a party from a judgment for mere irregularities not affecting the jurisdiction is limited to one year after notice of the judgment, R. S. Ch. 125, § 38. 2. Under § 9, Ch. 264, Laws of 1860 2 Tay. Stats. 1865, the right of a party to appeal from an order of court, is not cut off until the expiration of thirty days after the service upon him of a *written notice* of the making of such order. Opinion by COLE, J.—*Rosenkrans v. Kline.*

HIGHWAY TAX—DUTY OF OVERSEER.—1. Our statute Sec. 41, ch. 19, Tay. Stats. makes it the duty of the overseer of highways to give at least three days notice of the time when and place where one must appear and pay his highway tax in labor. 2. A tax due in labor can not be converted into a tax payable in money, without the refusal or neglect of the person from whom it is due to appear and work at the time and place specified in the notice by the overseer. 3. The overseer

has no right to return a tax as unpaid, and the town clerk has no right or power to enter a tax as delinquent, where the proper notice to appear and work has not been given. Opinion by COLE, J.—*Biss v. The Town of New Haven.*

RIPARIAN RIGHTS—TITLE TO LAND BEYOND ORIGINAL BOUNDARY—DAMAGES—PRACTICE.—1. A riparian proprietor who has lawfully intruded into the water for the construction of a breakwater can not thereby acquire title in fee to the land occupied by such breakwater beyond his original boundary; nor can he, in a proceeding for compensation for the alleged taking of such land, recover for any injury done to the breakwater. 2. Time under rule 20 of this court (relating to motions for a rehearing) can be enlarged by order of the court only, and not by mere stipulation. Opinion by RYAN, C. J.—*Diedrich v. N. W. Union Railway Co.* [On motion for a rehearing. See 5 Cent. L. J. 268.]

TAXATION—TAX DEED—DEFENSE TO ACTION BY GRANTEE.—1. Without a fair and equal assessment made in compliance with the statute there can be no valid tax. 2. In an action under § 35, Ch. 22 of 1859, by the grantee in a tax deed, to bar the title of the former owner, any defense, though not enumerated in § 38, which goes to the groundwork of the tax, is admissible, without the deposit required by the latter section. If it were held otherwise, said sec. 38 would be invalid. 3. Thus, such an action may be defended, without any deposit, upon the ground that the assessor did not value defendant's lands, nor any considerable portion of the lands in his town, from actual value, and did not inform himself in any manner of the actual or relative value of the lands, but valued them arbitrarily, and did not make and annex to the tax roll the affidavit required by the statute nor sign or certify said roll. Opinion by RYAN, C. J.—*Philleo v. Hiles et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF NEVADA.

July Term, 1877.

HON. THOMAS P. HAWLEY, Chief Justice.
" W. H. BEATTY, } Associate Justices.
" O. R. LEONARD, }

EQUITY CASES—JURY TRIAL.—1. Under the Constitution and Statutes of the State of Nevada, an equitable defense to an action can not be pleaded in a justice's court. 2. When the district court, in the trial of an equity case, calls a jury to decide specific issues, and the jury also find a general verdict; *Held*, that the presumption is that the court only called the jury as advisory; that until the verdict has been sanctioned by the court it is no proof that it was actually rendered in the case, and that the party against whom the verdict is found is entitled to ten days after the findings are filed by the court in which to give the notice to move for a new trial. Opinion by LEONARD, J., reversing.—*Duffy v. Moran.*

APPEALS FROM ORDERS MADE AFTER FINAL JUDGMENT.—1. An appeal from a special order made after final judgment must be taken within sixty days after the order is made. 2. In taking an appeal from orders based upon affidavits, no statement on appeal is required. It is only necessary to annex the affidavits to the orders and have them properly certified. 3. The fact that the orders are embodied in a bill of exceptions allowed by the judge, is not sufficient to prevent a dismissal of the appeal, unless the affidavits are annexed to the orders and a certificate given as required by section 1401, vol. 1, Compiled Laws. See Comp. L., secs. 1393, 1398, 1251, 1671, 1401. Appeal dismissed. Opinion by BEATTY, J.—*Weinrich v. Porteus.*

MANDAMUS—CERTIFICATES OF MINING STOCKS.—Where relator claims that he is the owner of and entitled to certain certificates of mining stock which the trustees of a corporation refuse to issue him; *Held*, that *mandamus* is not the proper remedy, as he has a plain, speedy and adequate remedy at law by an action against the company for the value of the stock claimed, and for the further reason that a *mandamus* ought not to be issued to compel the trustees of a corporation to issue certificates of stock to relator where it clearly appears from the petition and answer that the stock is claimed by other parties, who have not the opportunity in this proceeding to assert and defend their rights. *Mandamus* denied. Opinion by LEONARD, J. — *Elliott v. Guerreno.*

NOTES.

A BILL has been presented to the British Parliament for the establishment of a High Court of Criminal Appeal. The bill, as drafted, provides that the court shall consist of the Lords Chief Justices of the Queen's Bench and Common Pleas, three senior judges, and the Home Secretary, five to be a quorum. The court shall be entitled to take up any case on which there has been a capital conviction on an appeal from the person condemned, and counsel will be heard both for the prosecution and for the prisoner, the expenses of the appeal to be borne by the crown. The judgment of this court must be affirmed by a majority of two-thirds, the execution of the sentence to be stayed until the determination of the court is known.

THE Great Law Case—James Johnson v. St. Andrew's Church, by R. D. McGibbon. Montreal: Dawson Bros. 1877, is the title of a pamphlet of 100 pages, which has been laid upon our table. It is a complete history of a lawsuit which caused considerable comment in Canada, and in-involved the right of a pew-holder to his pew after notice to surrender it had been given to him by the trustees of the church. The case went to three courts, and it is likely to be taken to another—the English Privy Council. The Superior court dismissed the plaintiff's action for damages for ejection; its decision being affirmed by the Queen's Bench, Donlin, C. J., and Ramsey, J., dissenting. On appeal to the Supreme Court of Canada this judgment was reversed, and a judgment in his favor for $300 damages and costs entered, Richards, C. J., and Strong, J., dissenting.

A CORRESPONDENT writes: "Your publishing in a recent issue the story of the dismissal from the British Navy of an engineer convicted on the 'testimony' of a parrot, leads me to say, that while that story probably exaggerates the weight given to the parrot's 'testimony,' yet it is not such a travesty upon the frequent course of proceedings of naval courts-martial as 'land-lubbers' may suppose. In a recent case, falsifying accounts was proved against an officer by means of *copies* made by another party. The originals which had been figured on by several persons, were not allowed to be introduced, but the copies containing the maximum of errors of 'falsifying' done by the various hands, was proof conclusive to the minds of the learned members of the court of the guilt of the accused officer. I ought to add that the Navy Department did not sustain the court. I have been Judge Advocate of a number of Naval Courts-Martial, and know whereof I speak."

THE library of the Chicago Law Institute contain, according to a report just published, 9,493 volumes, composed of Text Books, 1,493 volumes; American Reports, 2,618; English, Scotch and Irish Reports, 1,628; Canadian Reports, 110; Leading Cases, 116; Statutes, American, 308; Statutes, English, 153 Digests, American and English, 266; Session Laws, American, 791; Canadian Statutes and Session Laws, 62; Bound Periodicals, 353; Trials, 110; American State Papers, 651; Civil and Constitutional Law, 188; General Jurisprudence, Histories, Biographies, Speeches, Reports of Law Commissioners and Law Tracts, 272; Encyclopedias, Dictionaries and Political Statistics, 87; Catalogues, 27; Directories, 42; Ordinances, etc., 31; Proof Sheets, 38; Duplicates 119. It is also in receipt of 32 law periodicals. But one volume has been lost during the year, although the rules of the institute allow members to take books to their offices.